UNIVERSITY OF ALBERTA

# EVALUATING THE THEORY AND PRACTICE OF MEDIATION: LESSONS FOR NIGERIA FROM THE CANADIAN EXPERIENCE

by

**Celestine Nduka Ahanonu** ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws

Faculty of Law

Edmonton, Alberta

Fall, 2006

Library and
Archives Canada

Published Heritage
Branch

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque et
Archives Canada

Direction du
Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

*Your file Votre référence*
*ISBN: 978-0-494-22133-4*
*Our file Notre référence*
*ISBN: 978-0-494-22133-4*

NOTICE:
The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:
L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

# UNIVERSITY OF ALBERTA

Library Release Form

Name of Author: Celestine Nduka Ahanonu

Title of Thesis: *Evaluating the Theory and Practice of Mediation: Lessons For Nigeria from the Canadian Experience*

Degree: Master of Laws

Year This Degree Granted: 2006.

Permission is hereby granted to the University of Alberta to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves all other publication and other rights in association with the copyright in the thesis, and except as herein before provided, neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form without the author's prior permission.

**Celestine Nduka Ahanonu**

# ABSTRACT

The thesis examines the concept of mediation as a contemporary law reform movement in common law jurisdictions. It highlights some of the court-annexed mediation programs in Canada and the court-annexed mediation program of Lagos State, Nigeria, and analyzes some of the adaptations that classic mediation usually undergoes in the court-annexed contexts. It also examines some of the general problems inherent in annexing mediation to the judicial process as shown by the experiences of the Canadian jurisdictions and draws a comparison between the Lagos project with the court-annexed mediation programs in Canadian jurisdictions.

The thesis recommends flexibility, volition and awareness as the essential elements, which every mediation program should contain, if it is to increase the satisfaction to be derived by the disputants from the justice system.

# ACKNOWLEDGEMENT

I have long held the belief that nothing is more fascinating about the law than the practice of law itself. That is even more so when one earns a decent living out of it. For me, the decision to undertake graduate studies at the expense of legal practice was not an easy one to make. But I dared because I also believe that I can excel in legal scholarship as much as I hope to do in legal practice. I thank the Good Lord for giving me the courage to make the decision and for His mercies in seeing me through the program.

I owe a great debt of gratitude to the University of Alberta and their partners for setting up the Alberta Law Foundation Scholarship Fund which has made it possible to finance my graduate program. I also thank the faculty of law at the university for providing additional financial support to me all through my program. I consider myself fortunate to have interacted with some of the faculty members who are indeed among the best legal minds I have ever come across. I want to express my gratitude to my supervisor, Professor Catherine Bell, for her deep understanding of the central theme of my thesis and skillful guidance in focusing and organizing my thoughts. Her experience and outstanding work ethic turned what could be a bumpy ride into a joyful cruise. I also wish to thank Diana Jean Lowe, Executive Director of Canadian Forum for Civil Justice, the co-supervisor, whose expertise and mentorship has been very instrumental in guiding me through the program. Professor Russell Brown – one of the members of my defence committee, Professors Fredrick De Coste, Robert Chambers, Annalise Accorn, Sanjeev Anand have also being very influential in shaping my views about legal scholarship. I thank them for their time and efforts.

I am also grateful to the amiable staff of the law library – most especially Mark Fairall, Ina Kwok, Shelley Brown and Yueling Li, for their assistance, which made my times in the library most pleasant and memorable. I will thank my friends, Breeann Barry, Ifeoma Onyerikam, Olumide Adetunji, Kelechi Madu and his wife Emem Kelechi – Madu for the friendship we share, which on its own lightened things up in those stressful periods of research and writing.

Some experiences are so precious and special that if it were possible one would have had time stand still so we might live those moments forever. Indeed, my days in the Patient Foods Service of the University of Alberta Hospital, where I have been working since I commenced my graduate program, have been very exciting that I wish I would never have to leave. I made great friends that I hope to keep for the rest of my life and I encountered people that have made stunning impacts on my life as well. However, I believe none will take it amiss when I single out for special mention three remarkable individuals – Barbara Marocco, a compassionate, caring and gentle woman who as the supervisor seeks to share her heart with everybody and in every situation; Darlene Darlyn-Kizak, very nice, wise and warm person who understands the importance of the very small things in life; and John Varghese, a wonderful friend who, like a soul brother, is ever present in all circumstances. I thank Barbara, Darlene and Varghese for their love, care and tremendous support, which kept me going me when my mother passed away midway into my program.

Special mention must be made here of my mother, Late Mary Obioma Ahanonu, who started it all in me but could not see me become what she had always wished me – a Professor of Law. Her memory shall remain my greatest inspiration. I am also hugely indebted to my cousin, Reverend Father Chris Ohazulume for believing in me and going the extra mile to see that I succeed in everything I do. I am thankful to my brother Okey and my other siblings for their love and encouragement. To all my other relatives and friends, I say " Thank you all".

# DEDICATION

To the loving memory of my mother – Late Mrs. Mary Obioma Ahanonu (Ochi-Ora)

# CHAPTER ONE

# CONCEPT OF MEDIATION IN COMMON LAW JURISDICTIONS

## A. Introduction

Mediation is one of the alternative dispute resolution ("ADR") processes that evolved in recent times in common law jurisdictions. Although most indigenous communities had similar forms of non-adversarial dispute resolution processes in pre-colonial times, mediation found its way into the western legal system as a result of the need to supplement adversarial adjudication.[1] In some jurisdictions, mediation has become annexed to the judicial process to address perceived deficiencies such as cost of litigation, delay and lack of flexibility in the judicial process. In Alberta, for example, disputants can make use of mediation in civil actions at the Provincial Courts.[2] However, even where mediation is not part of the judicial process, it has grown into one of the most noticeable features of the dispute resolution mechanism in common law jurisdictions.

To understand the nature and scope of mediation as a method of resolving disputes, it is important to establish what ADR entails and how the concept crept into common law jurisdictions. Alternative dispute resolution refers to a wide variety of procedures and techniques, which serve as alternatives to adjudication in resolution of disputes. Although the techniques differ from each other, they all share similar traits: they differ in some respect from court adjudication and emerged long after litigation was established as the dominant method of resolving legal disputes in common law jurisdictions.

---

[1] See e.g. Jerold S. Auerbach, *Justice Without Law?* (Oxford: Oxford University Press, 1983) at 5.

[2] See Alberta, *Mediation Rules of the Provincial Court – Civil Action*. See also Ontario, *Civil Procedure Rules; Notice to Mediate (General) Regulation*, B.C Reg. 4.

There are a number of processes that constitute alternative dispute resolution. These include arbitration, negotiation, mini-trials, med-arb and third party neutral evaluation. The level of participation by disputants in identifying issues and fashioning outcomes varies in each of these processes and distinguishes them from mediation in which disputants design solutions with the assistance of a mediator. For example, while arbitration involves the submission of disputes to a third party who usually has the authority to render a binding decision after hearing arguments from both parties, in negotiation, parties acting by themselves or through legal representatives, seek to resolve their dispute on their own. There is usually no third party involvement to facilitate the process. Mini-trials take on several forms. In some jurisdictions judges deliver binding decisions on specific issues. In others mini-trials entail the use of a neutral advisor, who might be a retired judge or another lawyer, to facilitate negotiations between parties. The neutral advisor is often called upon to render an opinion on how a court might decide the matter. Med-Arb is a hybrid procedure in which a third party called a med-arbiter is authorised by the parties to serve first as a mediator and then as an arbiter, empowered to decide any issue that cannot be resolved through mediation. In third party neutral evaluation, a neutral evaluator meets parties at an early stage of a case for the purpose of making a confidential assessment of the dispute and to promote efforts to arrive at a settlement.[3]

The purpose of this thesis is to examine the court-annexed mediation program of Lagos State, Nigeria in the light of the developments in selected Canadian jurisdictions and to identify areas in need of reform. The first chapter provides background and context for the chapters that follow. In pursuit of that, the emergence of alternative dispute resolution and nature, reasons, models and features of mediation are discussed. Chapter two focuses on how mediation works in practice by analysing its application to two classes of disputes – family and commercial. It argues how success in these classes, as in others, depends on mediation skills, the importance of maintaining relationships and protecting confidentiality. Procedural reforms incorporating mediation and related issues in Alberta, Saskatchewan, Ontario and British Columbia are examined in chapter three. Attention is also given to the impact of these reforms on adjudication. Chapter four outlines the court annexed program in Lagos State and draws comparison to resolution of family and commercial disputes as well as reforms in the Canadian jurisdictions. I conclude by highlighting the areas in need of reforms in Lagos State and lessons to be learned from the developments in Canada.

---

[3] There are now many variations to conventional ADR processes such as non-binding arbitration and facilitated negotiation. For more detailed discussion of the different ADR processes see e.g. Katherine V.W Stone, *Private Justice: The Law of Alternative Dispute Resolution* (New York: Foundation Press, 2000) chapters 3, 5-7.

## B. Emergence of Alternative Dispute Resolution

The idea of common law was introduced in England by the Normans, who conquered England in 1066.[4] At inception, the common law was conceived as a system that would incorporate the finest traditions and customs of the different districts and counties in England into a single body of laws that could apply throughout the entire country. It witnessed phenomenal changes, in its attempt to fashion out the most effective way of resolving disputes in society.[5] However, by the eighteenth century, adversarial adjudication became entrenched in the legal system as the mechanism for administering justice in the society.[6] In adversarial adjudication, parties actively contest with each other before an impartial decision maker. The process is to have the dispute adjudicated upon by a judge or tribunal with authority to resolve disputes by pronouncing judgment that is binding on the disputants. In Canada, the adversarial system has been described thus:

> Our mode of trial procedure is based on the adversary system in which contestants seek to establish through the relevant supporting evidence, before an impartial trier of facts, those events or happenings, which form the basis of their allegations. This procedure assumes that litigants, assisted by their counsel, will fully and diligently present all of the material facts which have evidentiary value in support of their respective positions and these disputed facts will receive from the trial judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in

---

[4] The Common Law originated as a result of the reforms carried out by the Normans following their defeat of King Harold and his forces in 1066 at the battle of Hastings.

[5] Different procedures such as Trial by Battle, Ordeal, Compurgation or Wager of Law and Jury were used at various times at common law for resolving disputes, see Theodore F.T Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworths, 1956) at 115; Sir Frederick Pollock & Frederick William Maitland, *The History of English Law*, 2nd ed., vol.2 (Cambridge: University Press, 1911) at 634, for details about how and why some of the procedures were abolished.

[6] See Plucknett, *ibid.* at 68.

> controversy. A trial is not intended to be a scientific exploration with the presiding judge assuming the role of research director; it is a forum established for the purpose of providing justice for the litigants. [7]

Canadian society, like other free market societies that have historical connection with England, promotes private property, economic efficiency and individual rights. Illustrating the link between the adversarial process and competitive, market-driven and individualistic society, Kutak has this to say:

> [T]he fact that ... society has so many competitive institutions ... does suggest that the adversary system of justice reflects the same deep-seated values we place on competition among suppliers, political parties and moral and political ideas. It is an individualistic system of judicial process for an individualistic society.[8]

Anglo-American capitalism had its origin in the Industrial Revolution of the eighteenth century. The revolution transformed feudal England to a capital-driven and market-oriented society. The emergence of a new but highly influential class - the merchants, led to a drastic reduction of the powers of the monarchy and nobility.[9] Competition of ideas, interests and rights became accepted as the foundation of the new society and these values brought about significant changes in both the substantive and procedural laws of England.[10] Those ideals and the changes that accompanied them were eventually exported to the then New World and other colonies of Great Britain. Given the relationship between adversary systems and free market societies, one might also expect adversarial adjudication to produce decisions that are satisfying to all parties, if the legal "competition" is deemed fair to all concerned. But that was not to be, as shown by the problems that arose soon after adversarial litigation became established. Commenting on the state of the judicial process in the early nineteenth century, May said:

---

[7] *Philips v. Ford Motor Co.,* [1971] 18 D.L.R (3d) 641 at 661(Ont. C.A).

[8] Robert J. Kutak, "The Adversary System and the Practice of Law"in David Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers Ethics* (Totowa, NJ: Rowman and Allanheld, 1983) at 174-5.

[9] Stephen Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* (Washington DC: West Publishing, 1988) 16.

[10] See *ibid.* at 17.

> Heart-breaking delays and ruinous costs were the lot of suitors. Justice was dilatory, expensive; to the rich, it was a costly lottery: to the poor, a denial of right, or certain ruin. The class who profited most by its dark mysteries were the lawyers themselves. A suitor might be reduced to beggary or madness, but his advisers revelled in the chicane and artifice of a lifelong suit and grew rich. Out of a multiplicity of forms and processes arose numberless fees and well-paid offices. Many subordinate functionaries, holding sinecure or superfluous appointments, enjoyed greater emoluments than the judges of the courts and upon the luckless suitors again, fell the charge of these egregious establishments. If complaints were made, they were repelled as promptings of ignorance: if amendments of the law were proposed, they were resisted as innovations. To question the perfection of English jurisprudence was to doubt the wisdom of our ancestors…a political heresy, which could expect no toleration. [11]

It is important that law and methods used in the administration of justice reflect the basic characteristics of the society which they are to serve. However, to serve society efficiently, law and its processes should be flexible enough to respond to changes that occur in that society. Efficiency, in this context, means, as explained by Roscoe Pound, that:

---

[11] Sir Thomas Erskine May, *Constitutional History of England*, 2nd ed. by Francis Holland [1912] cited in Plucknett, *supra* note 5 at 73.

> Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need for stability and the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action where a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in actual life, which it is to govern.[12]

The Common law was a dynamic process, its features evolving from the time of the Normans to the eighteenth century when adversarial adjudication became entrenched. However, associated with the adversarial process were strict procedures. Although it shared the competitive orientation of free market societies, the adversary process, with its strict procedures, proved inconsistent with the character and complexity of the society which it originally emerged to serve. It could not comply with the requirements of "speed, precision, definiteness and continuity" which characterise the conduct of business in modern bureaucracy and industry.[13] The consequences of this inability included congestion in the court's dockets, delay, and excessive costs of pursuing lawsuits, as witnessed in present common law jurisdictions.[14]

---

[12] Roscoe Pound, *Interpretation of Legal History* (Cambridge: University Press,1923) at 1.

[13] Dale A. Nance, *Law and Justice: Cases and Readings on the American Legal System* (Durham: Carolina Academic Press, 1999) 318 referring to the requirements of modern bureaucracy and industry as espoused by Max Weber.

It was in response to these problems that alternative dispute resolution also emerged as a law reform movement in the United States in the 1970s.[15] The crisis in the civil justice system was so intense that Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, with the purpose of developing proposals for judicial reforms.[16] The Chief Justice suggested, among other things, the creation of informal tribunals for minor disputes involving consumer complaints and the like :

> [W]e could consider the value of a tribunal consisting of three representative citizens, or two non-lawyer citizens and one specially trained lawyer or paralegal, and rest in them final unreviewable authority to decide certain kinds of minor claims. Flexibility and informality should be the keynote in such tribunals and they should be available at a neighbourhood or community level and during some evening hours.[17]

Professor Sander of Harvard law school, on the other hand, canvassed the idea of "a multi-door courthouse" which he argued would bring about greater flexibility, efficiency, and fairness into the American legal system.[18] The multi-door courthouse was intended to offer a variety of dispute resolution services in one place, with a single intake desk for the purpose of screening clients and determining the dispute resolution process that would best serve their needs. As determined by the nature of each dispute, parties could be referred to mediation, arbitration, fact-finding, superior court or an ombudsman.[19]

---

[14] See e.g. James A. Woods, "Stage 1: Fundamentals of Commercial Litigation in Canada" in Charles Platto, ed., *Economic Consequences of Litigation Worldwide* (The Hague: Kluwer Law International, 1999) 351 at 359.

[15] See Stone, *The Law of Alternative Dispute Resolution, supra* note 3 at 3.

[16] The Conference was organised to commemorate the 70th anniversary of Roscoe Pound's speech to the American Bar Association in 1906 in which he called for reforms in the adversarial process.

[17] Warren E. Burger," Agenda for 2000 A.D – A Need for Systemic Anticipation" Proceedings *of Pound Conference held in 1976*, 70 F.R.D 83 at 92.

The outcome of the Pound Conference was an innovative experiment conducted by the Department of Justice and National Institute of Justice in three American cities - Atlanta, Kansas City and Los Angeles.[20] Mediation centres, otherwise called "the Neighbourhood Justice Centres" were established to experiment with the idea that when given the choice, people are likely to go to mediation/arbitration centers in their neighbourhood to get faster, less expensive and equally good, if not fairer resolutions of their disputes than courts would provide.[21] Cases mediated at the centres included, but, were not restricted to, neighbourhood issues, personal injury, small claims, real estate, divorce and child custody and were handled by mediators of diverse backgrounds, most of whom were independent contractors.[22] The experiment was a huge success.

---

[18] *Ibid.* at 131.

[19] An ombudsman is a person that receives and investigates complaints brought against an institution by its members, employees or members of the public that have dealings with it.

[20] Peter Lovenheim, *Mediate, Don't Litigate* (New York: McGraw-Hill Publishing, 1989) at 5.

[21] As espoused by Professor Frank Sander, the concept of "The Neighbourhood Justice Centres" was one of the ideas that would bring about flexibility, efficiency and fairness into the American legal system. See *supra* note 18.

[22] See Edith B. Primm, "Neighbourhood Justice Centre: A Brief 26 Year History," online: The Atlanta Bar <http://www.atlantabar.org/aba/adr.>.

During the 15-month test period (1977 - 1979), the centres handled 3947 disputes, and the outcome showed that more than 82% of the cases mediated by the centres were successfully resolved.[23] The six-month follow-up interviews with the disputants showed that 88% and 89% of "claimants" and "respondents" respectively were satisfied with the overall mediation experience while 84% of "claimants" and 89% of "respondents" expressed satisfaction with the mediation process itself.[24] The success of the experiment in the three cities influenced the establishment of mediation centres in other North American cities. By 1987, more than 220 mediation centres had started operating in the United States, Canada and Puerto Rico.[25]

As a result of the similarity of the legal systems, concerns about delays, costs and frustrations associated with litigation were equally prevalent in Canada as they were in the United States.[26] However many lawyers and judges in Canada were initially very critical of the perspective that "ADR was a necessary response to the failings in the existing justice system" and opposed using mediation for problem-solving, as it was a process unfamiliar to them.[27] However, the Canadian Bar Association in its 1996 Report on Systems of Civil

---

[23] R.F Cook,J.A Roehl & D. Sheppard, *Neighbourhood Justice Centers Field Test: Final Evaluation Report, Executive Summary* (Washington, D.C: Government Printing Office,1980) at 7. It is important to note that the new approach attracted patronage from all angles as cases were being referred to the centres by members of the public, the bar and even the bench: See Edith B Primm, *ibid.*

[24] Cook, *ibid.* at 7.

[25] *Ibid.* at 8.

[26] See Woods, *supra* note 14 at 359.See also Henry J. Brown & Arthur L. Marriot, *ADR Principle and Practice* (London: Sweet & Maxwell, 1993) at 15.

[27] See Andrew J Pirie, "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?" (1982) 63 Can. Bar Rev. 378 at 382.

Justice later confirmed the desirability of alternative models for resolving disputes and took the position that alternative dispute resolution should "not be viewed as superior or inferior to, or indeed separate from court adjudication."[28]

The creation of mediation centres and use of independent mediators as supplements to adjudication did not take away the problems of delay and high cost of litigation in Canada. Concerned about these problems, the Canadian Bar Association [CBA], in 1995, formed a Task Force on the Systems of Civil Justice ("CBA Task Force") "to inquire into the state of the civil justice system on a national basis and to develop strategies and mechanisms to facilitate the modernization of the justice system so that it is better able to serve the current and future needs of Canadians."[29] The Task Force identified delay, cost of litigation and lack of understanding of the civil justice system as the main issues affecting access to civil justice in Canada and recommended, among other things: creation of a multi-option justice system that would incorporate dispute resolution options into the litigation process, reduction of delay in courts through the use of case management tools, reduction of costs by increasing the jurisdiction of small claims courts, and the introduction of incentives to encourage settlement and prudent use of court time.[30] Two important results of the CBA Task Force report were the establishment of court-connected dispute resolution programmes by different Canadian provinces and the incorporation of case management tools in the rules of court.[31]

---

[28] Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (Ottawa: The Canadian Bar Association, 1996) at 4.
[29] *Ibid.* at 1.
[30] *Ibid.* at v – vii.

Although I have emphasized the relationship between ADR and judicial process, it is important to note that the ADR movement today is about more than curing the deficiencies in the administration of justice. As Pirie argues, ADR plays a dominant role in many other social contexts and is best understood as a developing ideology that has emphasized and moved beyond collaborative problem solving to embrace a wide range of dispute resolution processes. As a field of study, it is concerned with critical and context specific analysis of disputing processes, behaviours and institutions. However the ability of mediation to respond to deficiencies in litigation and quickly settle disputes continues to be the primary reason for its incorporation into judicial dispute resolution processes and its measure of success in this context.[32] For this reason, I have selected mediation as the focus of this thesis.

## C. Nature of Mediation

Mediation is most commonly used to refer to a process in which a neutral third party facilitates communications and negotiations among parties to a dispute for the purpose of achieving resolution by the agreement of the parties.[33] A distinctive element of classic mediation is that it is usually a voluntary and non-binding process, as the mediator cannot impose any decision on the parties. Although the whole process is consensual, the outcome may bind the parties once the terms of settlement are reached and the parties sign an agreement to that effect. Settlements arising from mediation may be enforced as other contracts by the courts.[34]

---

[31] See e.g. *supra* note 2. See also Ontario, *Family Court Rules*, r.39.

[32] Andrew J. Pirie, *Alternative Dispute Resolution:: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at 8-9.

[33] As discussed in Chapter 3 of this thesis, some court-annexed programmes are mandatory.

There are different steps involved in mediation, but there is no hard and fast rule regarding when one step gives way to another. Flexibility is the key to every mediation session and parties and the mediator are free to devise whatever structure that fits the circumstances of the case. However, a classic mediation session usually begins with the introduction of the mediator and his or her opening statement. The purpose is to explain the ground rules to the parties, putting them at ease, and building their confidence in the mediator and the process.[35] The mediator's preliminary statements are usually followed by the opening statements of the parties. In their opening statements, parties are given the opportunity to explain to the mediator and each other what they think about the dispute. When parties have clearly exchanged sufficient information about the case, the mediator will then help identify the issues in dispute. This is followed by the mediator's attempt to identify the underlying interests of the parties, sometimes through caucusing or private meetings. It is usually at this stage that the mediator uses his or her experience and skills to help the parties generate options that may be used to settle the dispute. The process usually ends with an agreement, if the case is settled, or a report by the mediator on the progress made, if the parties fail to settle their dispute.[36]

---

[34] Stone, *supra* note 3 at 33.
[35] See *ibid* at 37.

To understand the philosophy of mediation as a dispute resolution process, it is helpful to examine the principles upon which the process is built as well as the reasons for its efficacy. Mediation hinges on the principle of co-operative problem solving - the bedrock of many, but not all forms of alternative dispute resolution.[37] It de-emphasizes the win-lose mentality of parties in dispute and encourages a non-adversarial attitude. In litigation, parties advance their positions without regard to satisfying the adversary's interests and expectations while mediation seeks to help parties understand that there are other aspects to the dispute deserving consideration such as confidentiality, cost and the need to maintain an on-going relationship, where one exists. Consequently, agreements that might be achieved through mediation could be practically inconceivable in litigation. In the words of Macfarlane, "persuading persons involved in a conflict to accept at least the existence of another social reality – that of the other side – demands that they step outside their own construction of the problem." [38] This is what mediation helps parties to achieve. Comparing non-adversarial processes with adjudication, Pirie observes:

---

[36] The description of the stages of mediation given here is based on the hands-on experience I had while observing some mediation sessions. However, for more details see for e.g. Desmond Ellis & Dawn Anderson, *Conflict Resolution:: An Introductory Text* (Toronto: Emond Montgomery Publications, 2005) 90-96, George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian, 2003) 164-168.

[37] See Brown & Marriot, *supra* note 24 at 11.Exceptions include arbitration which is adversarial in nature.

[38] Julie Macfarlane," Why Do People Settle" (2001) McGill L.J. 663 at 675.

> Whereas competing and winning may be identifiable traits in an adversarial approach to dispute resolution, problem-solving behaviours will chiefly characterize a non-adversarial approach to disputing.... the notion of problem solving encourages disputants and their lawyers to view the dispute as a mutual problem and to take a collaborative approach to the process of resolution. Rather than a clash of conflicting demands, an exchange of threats and counter threats, a contest of wills and resources, lawyers and disputants as problem solvers would find themselves working to find solutions that would be mutually satisfactory or win-win.[39]

Mediation is, indeed, "the antithesis to court adjudication."[40] It exhibits all the features that litigation lacks and therefore serves as an escape route for people that are eager to avoid the frustrations associated with litigation. According to Fuller, "[t]he central quality of mediation is its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another."[41] Mediation does not eliminate disputes or reduce the intensity of the feelings when disputes occur, but can move disputes in different directions enabling parties to explore all potential solutions. When properly conducted, mediation may also ensure fairness between disputing parties by addressing issues such as power disparity, differences in age, gender, race and social status, which are likely to affect the competitive abilities of parties if the dispute is litigated.[42]

---

[39] Andrew J Pirie, *Alternative Dispute Resolution: Skills, Science And The Law* (Toronto: Irwin Law, 2000) at 61.

[40] *Ibid.* at 73.

[41] L.L.Fuller," Mediation – Its Forms and Functions" (1971) 44 S. Cal. L. Rev. 305 at 325.

## D Why Mediation ?

Mediation has been criticised as an instrument of coercion in the hands of policy makers; a process that denies disputants the due process of the law and the equality that it confers; and not being as truly cost-effective as its proponents would like others to believe.[43] Most court-annexed mediation programs force litigants out of the adjudicatory process by imposing mediation on all manner of cases.[44] The aim is often to decongest the courts, dispose of cases as quickly as possible and reduce the costs incurred by litigants by way of legal fees. Mediation can be cheap and fast if it works but it compounds the problem of delay and cost where it fails. Parties, who are unable to settle their dispute through mediation, have to defray the cost of mediation in addition to the legal fees to be paid for litigation.

However, despite the arguments of critics, mediation has been very effective in common law jurisdictions when its features are in tune with the qualities expected of an effective dispute resolution system: speed in the settlement of disputes, cost effectiveness, flexibility and satisfaction.[45] Although mediation may be desirable for other reasons, the growth of mediation as part of the judicial process will continue to depend on these factors

---

[42] See Pirie, *supra* note 36 at 62.

[43] See Laura Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology,"(1993) 9 Ohio St. J. on Disp. Res. 1 at 3; see also Richard L Abel, "The Contradictions of Informal Justice" in Richard L.Abel, ed., *The Politics of Informal Justice* ,vol.1 at 268 (Reprinted) in Stone , *supra* note 3 at 25 – 28 & the discussion on power imbalance in Chapter Two.

[44] See for example, the mandatory mediation program in Ontario: Ontario, *Rules of Civil Procedure* (Court and Superior Court of Justice), r.24.1.01 and r.75.1.01. The problems created in the legal systems by court-annexed mediation are discussed in Chapter Three.

### 1. Speed

The adversarial process relies on the strict application of rules of procedure in resolving disputes between litigants. The rules of procedure in common law jurisdictions are elaborate, very complex in nature and can only be mastered by professionals whose business is about the law. Since the business of the clients is often conducted in courts by professionally trained lawyers, due diligence demands that lawyers seek to explore all the technical advantages on the side of their clients in every given situation. Lengthy procedures and excessive reliance on technicalities often bring about delay in litigation. In Canada for instance, statistics show that in 1985, 56.1% of civil cases in Ontario had been waiting on the civil rolls for at least twelve months and that between 1986 and 1992, the number of actions had increased by 68%.[46] In the face of such delay, judicial passivity is criticised with respect to the management of litigation.[47] As the judge must await the development of the evidence and other processes by the parties, he or she may feel incapable of protecting the proceedings from delay by contentious counsel. Inadequate resources and increased demand on the civil justice system are other reasons for delay.

---

[45] See Brown and Marriot *supra* note 24 at 44. The authors highlighted the criteria enumerated by Professor Sander, *supra* note 18 as preconditions for the effectiveness of a dispute resolution system.

[46] Publications Ontario, *Review of Civil Justice* (Toronto: Publications Ontario, 1995) at 62.

[47] See John Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Ch.. L. Rev. 832 for clear illustration of the distinction between the passive Common Law courts and active courts of the Civil Law jurisdictions.

Provisions recently incorporated into the civil procedure rules of the Canadian provinces are meant to expand the managerial powers of the judge with respect to controlling court proceedings.[48] For example, in Alberta, judges are to use tools such as pre-trial conferences and pre-trial orders to determine both the pace and direction of litigation.[49] These reforms are part of a trend in most jurisdictions to reform the rules to accommodate criticisms being advanced by exponents of alternative dispute resolution. The essence of these concerns is to maximize the use of resources and ensure that cases are disposed of more expeditiously. Despite such reforms, the Canadian jurisdictions are yet to keep the scourge of delay at bay. Mediation, with its flexible, informal approach, becomes a method of choice to disputants who would not like to be trapped in the web that litigation has become.

---

[48] See e.g. Alberta, *Rules of Court*, r.219.1.

[49] Pre-trial Conferences are meetings between the judge and parties whose cases are to be set for trial. The purpose of the meeting is to discuss the case and for the judge to express an opinion as to what is likely to happen in a trial. A pre- trial order is an order made by the court in respect of a case before the case comes up for trial.

### 2. Cost

Alternative dispute resolution assumes that justice means fairness and equality, so it must be affordable and accessible to disputants. However, the excessive cost of having "one's day" in court is a big problem for a system that encourages unrestricted access to justice. Often times, many people who have genuine claims to put before the court discover that they do not really have access to the court because of the prohibitive costs of pursuing and defending lawsuits. The cost is in terms of legal fees, which increase as the case drags on, time spent in pursuing or defending the action and the emotional costs of the case on litigants. Even for those who can afford it, litigation is extremely expensive and may affect other interests of the litigant adversely.[50] In most instances, the economic benefit accruing to successful parties in litigation is not commensurate with the cost of prosecution. In Canada, for example, the total legal costs associated with the prosecution of an action have been said to be equal to about 75% of a final award.[51] In the United States, it was observed that in 1985, successful litigants received between fourteen to sixteen billion dollars in award while accruing between sixteen and nineteen billion dollars in legal and incidental costs.[52]

---

[50] See Cook, *supra* note 23 at 23.

[51] Woods, *supra* note 26 at 16.

[52] Institute for Civil Justice, *Annual Report of the Institute for Civil Justice, 1988-1989* (Santa Monica, Cal: The Rand, 1989) at 46. Although these figures (including note 49) reflect the situations in both Canada and the United States in the 1990s and 1980s respectively, there is no reason to suggest that the trend has changed in recent times.

The extent of financial resources at the disposal of each litigant also determines the quality of representation he or she is going to have in court. Mediation helps to level the playing field for all parties by placing emphasis on resolving the dispute rather than awarding victory. It does this by attempting to move from legal positions of the parties and addressing their interests. Interests are the motives, desires and expectations of the parties which reinforce their legal positions. In fact, disputes are often considered the result of inadequate communication between parties as well as misunderstanding of each other's position.[53] Parties are also empowered to exercise a measure of control over the resolution process and such empowerment is "especially significant for a disputant whose mistrust of the other is founded on a profound sense of inequality [of resources, of access to representation, and so on] "[54] Potential litigants perceive mediation as a means of working out "justices" for themselves without incurring high costs after all. In most cases the party that believes he has great chance of winning a case in court is often influenced by the possibility of achieving same or even better result if the dispute is mediated rather than litigated.

---

[53] *Supra* note 3 at 42.

[54] Macfarlane, *supra* note 38 at 701.

### 3. Flexibility and Satisfaction

The existence of structured rules of evidence and procedure characterises the administration of justice in the adversarial system. In adjudication, the court is concerned primarily with application of the rules of procedure guiding litigants in their contests. Pound contended that one reason for people's dissatisfaction with the administration of justice is the exaggeration of the common law contentious procedure, which turns litigation into a game. It is taken for granted that judges, as mere umpires must not interfere in adversarial contests, once parties are playing by the rules of the game, even when such interference appears necessary "in the interest of justice"[55] It is a system that places great emphasize on procedural fairness.

In theory the application of law to the facts in any case before the court is usually determined by the principle of *stare decisis,* which principle ensures that a lower court is, in the determination of the issues before it, bound by precedents set on those issues by the higher courts. The decision of the higher court must remain the precedent on the relevant issue until the same court, another court of co-ordinate jurisdiction, or a court that is higher in the hierarchy of courts overrules it. However, a lower court can avoid the doctrine, if the court is able to distinguish the facts of the case before it from that on which a precedent has been set. If applied, *stare decisis* may work injustice against litigants because the court must follow past decisions. Although law may be considered in mediation, it is not the focus and settlements are not shaped by previous decisions of the court on matters with similar facts and circumstances.

---

[55] Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 40 American L. Rev 279 at 281.

The approach of litigation is also very confrontational. Filing a lawsuit means commencement of hostility between the disputing parties, which is likely to result in lasting scars on both.[56] Once papers are filed, there is high probability that the relationship which previously existed between the disputing parties will get worse, since some lawyers advancing the arguments of the parties often do everything necessary to show the opponent in the worst possible light. Commenting on the confrontational nature of litigation, Ethridge has this to say:

> Litigation paralyses people. It makes them enemies. It pits them not only against one another, but also against the other's employed combatant. Often disputants lose control of the situation, finding themselves virtually powerless. They attach allegiance to their lawyers rather than to the fading recollection of a perhaps once worthwhile relationship.[57]

Mediation has been very useful because of its flexibility in situations where the parties have to continue in their relationship after the resolution of the dispute. [58] It also tries to achieve solutions that affect interests of parties and others potentially affected who might not have had standing in court. Family disputes are good examples of areas where adversarial adjudication has proved unsuitable. For example, the emotional ties between children and grandparents might be very influential in settling custody disputes when the case is mediated but such factors might not come into play in litigation. Although there have been efforts to make litigation more sensible and sensitive for family disputants, such as the establishment of specialized family courts in some jurisdictions, there are still problems.[59] As previously discussed, litigation is very expensive and takes too long. In cases of divorce, the assets needed by the parties to maintain the children [if any] or to start separate lives for themselves are always depleted by the costs of litigating lengthy court battles.[60] Ill feelings resulting from the adversarial contest are likely to exacerbate the already bad relationship existing between the parties. The deterioration may affect the attitude of custodial parents regarding access. To reduce the devastating impact of divorce on the parties and the children, mediation has been identified in some Canadian jurisdictions as a more suitable way of resolving disputes between spouses. [61]

---

[56] Lovenheim, *supra* note 20 at 22.
[57] Jack Ethridge," Mending Fences: Mediation in the Community" in Levin, et al., *Dispute Resolution Devices in a Democratic Society* (Washington DC: Pound-American Trial Lawyers Foundation, 1985) at 76.
[58] See Edward Byrne," The Adversary System: Who Needs it?" [1982] 6 ALSA Forum 1 at 8.

### E. Choosing Mediation

There are many factors that influence the choice of mediation over litigation and points in the litigation process when agreement to mediate a dispute can occur. Parties might agree expressly from the outset that disputes arising from their anticipated transaction should be mediated or such agreement can arise out of a well-known rule that binds everybody in a particular trade or business.[62] Parties may also decide to settle their differences after a dispute arises. In this situation, mediation is often an attempt to avoid the pitfalls of litigation. Sometimes parties to a dispute go into mediation because the law stipulates that they do so or the court orders that a particular dispute be mediated. In Canadian divorce proceedings, for example, the law imposes a duty on lawyers working for spouses to inform their clients of mediation options available.[63] Legislation also makes it mandatory for certain disputes to be mediated.[64] Even when mediation is mandatory, it does not lose all of its character as a voluntary process. The law or court may order that some disputes be mediated, but, can never imbue the mediator with the power to impose a decision on the parties.[65]

---

[59] Pirie, *supra* note 36 at 248

[60] *Ibid.*

[61] See e.g. Ontario, *Family Court Rules*, r.39-40.There are similar provisions in other jurisdictions in Canada and the United States.

The decision whether to mediate a dispute or not is often made by the parties after comparing mediation with other dispute resolution methods.[66] A party may agree to mediate a dispute when mediation is considered more suitable for the attainment of that party's disputing goals. For example, a corporation with enormous financial resources and a history of using litigation may not wish to mediate a case involving a group of students injured in an accident arising from the actions of one of the company's drivers. The corporation may choose litigation ahead of mediation, particularly when it believes students do not have the financial ability to pursue the case to conclusion, might be unsettled as the case drags on, and would eventually discontinue the matter. However, the same company may elect to mediate a dispute, when it is sued by a consumer, for offering a defective product for sale. In this case, litigation might ruin the company's reputation and goodwill by bringing the issue into the public domain. The private and confidential nature of mediation will shield the company from negative publicity and probably more claims from other consumers. It is also not enough for a party to settle for mediation because it suits his or her disputing goals. The suitability and effectiveness of the mediation process to be used and the style of the mediator in question are also important in determining whether or not to mediate a dispute.[67]

---

[62] In sports, for example, disputes relating to sponsorship and employment are either referred to mediation or arbitration. See for example Articles S2 and S6 paragraph 10 of the Code of Sport-related Arbitration, International Court for Arbitration in Sports.

[63] *Divorce Act*, R.S.C. 1985, c.3, s.9 (1) and (2).

[64] See for *e.g. The Saskatchewan Farm Security Act*, S.S 1988-89, c. S. 17.1, s.15 which makes it mandatory for every legal action for foreclosure of farmland in the province to be mediated.

[65] The issues involved in voluntary and mandatory mediation are analysed in greater detail in Chapters One and Two.

[66] *Supra* note 35 at 183.

## F. Models of Mediation

One of the most critical theoretical issues in mediation is the extent of neutrality of the mediator, who also is expected to be skilful enough to bring about a settlement between the parties in dispute. Attempts have been made to classify mediation on the basis of the role performed by the mediator in the process.[68] There are three main ideological models of mediation. These are: facilitative, evaluative and transformative models.[69]

---

[67] *Ibid.*

In facilitative mediation, also known as classic mediation, the mediator helps the parties in their search for the solution to their own problem by facilitating communication through control of process and setting ground rules. Although the parties are expected to work out the solution to their problem, mediators guide the process through subtle and skilful intervention and may help the parties generate options that reflect the win-win philosophy of mediation. The parties would be unlikely to reach a settlement agreement without the mediator's input.

Evaluative mediation is a phrase used to describe a range of processes in which the mediator not only facilitates negotiations between parties but also makes an assessment, or expresses his or her opinion, regarding the likely legal outcome of a dispute if it goes to adjudication.[70] The danger of this model is that the neutrality of the mediator may be questioned, particularly by the party who feels threatened by evaluation. Despite the enhanced role of the mediator in this model, the entire process is still under the control of the parties. The evaluation given by the mediator is usually not binding but may only "influence the parties to reassess their respective strengths and weaknesses with a view to their agreeing to a resolution."[71] This model is suitable in cases where the mediator is versed in law or trade practices relating to the dispute in question. For example, where the mediator is a retired judge, it is reasonable for the parties to be guided by his or her advice about what the outcome of the dispute might be if it goes to adjudication.

---

[68] Robert A Baruch Bush & Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers,1994) ; See also Pirie, *supra* note 39 at 154.

[69] However, see the classification in Pirie, *ibid.* at 155.

[70] This model has been described as a hybrid of mediation and arbitration probably because of the huge influence such assessment may have on the parties. In as much as it is the responsibility of the parties to settle their dispute, the opinion of the mediator is likely to affect the position of the parties. See Pirie, *ibid.* at 154.

The above models have also been explained as mere mediation styles that could be adopted by mediators to achieve their aims. A mediator may start with the facilitative mode but may later resort to giving the parties an opinion "on what is likely to happen in the litigation if the case is not settled."[72] This is the style that is usually used in court-annexed mediation to achieve settlement and dispose of cases as quickly as possible.

The transformative model seeks to change either the dispute or the disputants and enhance the ability of disputants to deal with future conflict. Sometimes the aim can be to change a community itself. The mediator in this model seeks to ensure clear communication between parties since it is believed that disputes result from inadequate communication and misunderstanding of each other's point of view. The mediator in the transformative model often assumes the role of an educator in an attempt to bring the parties to the realities of dispute and source of conflict. The mediator may also assist parties to identify aspects of their behaviour that generate conflict or create barriers to conflict resolution.

---

[71] Brown & Marriot, *supra* note 19 at 115.

[72] Yaroslav Sochynsky," Mediation - Guide for Practitioners", *California ADR Practice Guide* (American Law Institute, 1996) reprinted in Stone, *supra* note 3 at 42.

The transformative model is ideal for complex public disputes or disagreements. For example, in policy dialogues between the agencies of government and other groups in the society, the mediator is likely to be more effective if he or she is able to convince the public about the desirability of a particular government policy. This he or she can only do if he or she assumes more than a facilitative role in the process. In the same vein, educating the concerned government agency about the views and concerns of the group of people that are likely to be affected by a particular policy of the government might be a way of helping the parties involved reach a resolution to their disagreement.

Mediation can also be classified as either "interest-based" or "rights-based." Interests refer to the factors that determine the actions of parties. It may be a party's belief in the legal merit of his or her argument or other non-legal factors such as revenge for humiliation suffered, self-fulfillment and anger.[73] In interest-based mediation the focus is "on the parties' interests and what they agree is a mutually satisfactory resolution to satisfy those interests."[74] As in facilitative model, the interest-based mediator does not give an opinion or evaluation of any dispute being mediated, but rather tries to create the enabling atmosphere for the parties to share their motives, desires, and concerns and to be actively involved in generating resolution options that will take care of the interests of all the parties to the dispute.

---

[73] See Michael P. Silver, *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths, 2001) 30-32.

[74] Cinnie Noble, L.Leslie Dizgun & D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998) at 13.

In rights-centred mediation, the mediator is concerned with analysing the facts of the dispute in the light of the applicable law, custom or trade practice; interpreting the law and stating the likely outcome of the dispute if the applicable rules are to be applied by an independent body.[75] As in the evaluative model, knowledge and expertise of the mediator is a key element in determining the effectiveness of the process. Because the procedure of rights-based mediation is similar to that of pre-trials, that is, the evaluation of the parties' claims is done with reference to the applicable legal rules, it is safe to say that this type of mediation actually takes place in the shadow of the law.

Apart from the models identified above, mediation has also been classified in a variety of other ways. Bureaucratic mediation has been used to label processes in courts or other institutional settings that control and limit what processes may be used or what the likely outcome may be. This model is characterized by greater rigidity, formalism and replicability.[76] Sometimes the labels "open" and "closed" are used to classify mediation based on the extent of control that parties, the latter applying to situations of minimal control.[77] It has been observed that as a result of the developments in the field, mediation has become more standardized and has as well developed common practice routines, which are usually adopted across the different models of mediation.[78] The existence of set rules in the practice of mediation has formalised the process and has also "closed' the entire process from being controlled by the parties. In open mediation, parties can determine what should form the ground rules and how they want to proceed with the whole process.[79]

---

[75] *Ibid.* at 6.
[76] See *ibid.*
[77] See Pirie *supra* note 39 at 154.

The "pragmatic mediation" model places great emphasis on agreement and mediators involved in this process are not restrained in any way by procedural niceties. It is the type of mediation often used in diplomatic circles for the purpose of settling violent conflicts. In activist or accountable pragmatic mediation model, the mediator not only has the power to determine who will participate in the dispute resolution process, but is also involved in determining what the outcome should be.[80] It is debateable whether a process that confers authority to determine the outcome of negotiations between disputing parties can be regarded as mediation. However, Menkel- Meadow argues that the label may be appropriate if "the parties understand the roles and different approaches to mediation."[81] Problems arise when the parties fail to understand the nature of the process or agree with what the mediator concludes, as the essence of classical mediation is for parties to agree on a resolution.

Although the models described above are different approaches used by mediators it must be noted that the models are not mutually exclusive. While facilitative settlement mediation and evaluative mediation are most commonly associated with the judicial process, there is a high degree of flexibility in the way the models are used in practice. Whatever model that is used, there are features that are common to most mediation processes. For example, mediation cannot take place where there is no mediator. The mediator is a non-partisan third party who usually has no power beyond that granted by the parties. As this thesis is concerned with a comparison of court-annexed mediation in Lagos State, Nigeria with those in Canadian provinces, emphasis in the subsequent chapters is on classic/facilitative mediation.

---

[78] See *supra* note 67.
[79] Pirie, *supra* note 36 at 154.
[80] For more details on the ideological models of mediation see Pirie, *ibid.* at 154-155.
[81] *Supra* note 67 at 230.

The success of any mediation process is highly dependent on openness and sincerity on the part of parties. Without candour, it is difficult for the mediator to discover true motives and interests. Parties may not be willing to make full disclosure if they fear information will be used against them in the event that settlement fails.[82] At common law, confidentiality is a very important aspect of all settlement negotiations.[83] However, the involvement of the neutral third party, that is the mediator, makes settlement through mediation more delicate and the need for confidentiality more imperative. Issues arising from the principle of confidentiality are addressed in the context of family and commercial disputes in chapter two and court-connected mediation in chapter three of this thesis.

---

[82] The legal issues arising from the principle of confidentiality is discussed in greater detail in Chapter Two of this Thesis.

[83] See Owen V. Gray," Confidentiality in Mediation" (1998) 36 Osg. Hall L .J 667 at 671.

# CHAPTER TWO

## MEDIATION AND THE LAW IN FAMILY AND COMMERCIAL CONTEXTS

Apart from speed, cost effectiveness and flexibility, the spread of mediation to all parts of North America as well as other parts of common law world within a relatively short period was because it worked in the resolution of a wide range of disputes. However, it proved particularly useful in resolving disputes between parties whose relationship with each other is likely to subsist after the dispute. This probably explains why it was widely used in negotiating collective bargaining agreements in labour disputes.[1] The success achieved in labour disputes has rubbed off in other areas, where relationships between disputants do not usually also end with the end of their dispute.

This chapter focuses on how mediation works in practice by analyzing the rationale, problems and prospects of the application of mediation to two classes of disputes - family and commercial disputes. The success of mediation in these classes of disputes, as in all others, has largely depended on the skills of mediators, the importance of maintaining relationships, and the confidentiality of communications. In this chapter I also argue that the principle of confidentiality can only be meaningful if it is given protection in law. Anything short of this can bring about the collapse of mediation as a means to address the failings of the adjudication system. It therefore discusses the scope of the protection given to communications made in mediation by common law, statutes and procedural rules of courts.

---

[1] The use of mediation in labour disputes in common law jurisdictions dates back to the nineteenth century. However, the effectiveness of mediation in that area was reinforced by the emergence of ADR in the 1970s. It is informed by the understanding between employers and their employees that their disputes are about divergent interests which can only be understood when parties engage in frank discussions. See *e.g.*, Henry J. Brown & Arthur L. Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 1993) at 211.

## A. Family Disputes

The use of non-adversarial methods in resolving family disputes began in North America some years before the emergence of modern ADR. It all started in the 1960s "when several probation officers and family division employees within the court system began experimenting with informal methods" in resolving divorce and custody disputes.[2] However, the momentum of its application to family law changed with the shift in social and moral values in North America, a shift that coincided with the rise of modern ADR in the 1970s.[3] The concept of freedom of the individual, which is an important feature of western civilisation, was extended in the 1970s to include the principle that "adults should be free to choose whether or not to remain in the marital union."[4] Marriage became recognised as a social and economic partnership, which should be less arbitrary and oppressive to individuals who might want to opt out when the partnership failed to work as anticipated.[5] The issue of fault became irrelevant in granting divorce while support and custody lost their places as tools used by courts to sanction the "guilty party" in divorce proceedings.[6] In Canada, "marriage breakdown" became sufficient grounds for divorce and couples could seek divorce after a one-year separation.[7] As in other partnerships, the gains and the liabilities of the relationship are to be divided fairly between the spouses in accordance with relevant matrimonial legislation or contracts.

---

[2] Connie J.A. Beck & Bruce D. Sales, *Family Mediation: Facts, Myths and Future Prospects* (Washington, DC: American Psychological Association, 2002) at 5.

[3] See *e.g. ibid.*

[4] Barbara Landau et al., *Family Mediation Handbook*, 3rd ed. (Toronto: Butterworths, 2000) at 1.

[5] See *e.g. ibid.*

The new approach brought about an unprecedented increase in divorce and separation rates in North America.[8] However, unlike other contractual relationships, parties could not simply walk out of the partnership of marriage once the dispute is over. Family disputes usually involve matters, which the parties are either emotionally attached to, such as custody of children, or highly dependent upon for their survival, such as marital assets.[9] The eventual losers in disputes between spouses are often the children who always need the love, care and attention of both partners for their growth and development. In Canada, it is estimated that an annual rate of about 150,000 children join the league of an already large number of children whose parents are separated.[10] In response to the needs of such children, the law has tied the issue of custody to the needs or best interests of children and economic support is determined on the basis of financial need and ability to pay.[11] The creation of special courts in some jurisdictions as well as the use of case management tools especially where children are involved have all been aimed at relieving the pains and anguish inflicted by divorce on parties and children.[12]

---

[6] See Connie & Sales *supra* note 2.

[7] *Divorce Act,* R.S.C.1985 (2nd Supp), c.3, s.8. But see R.S.C. 1970, c.D-8,[The old Act], which required a three – or five-year separation period.

[8] See *e.g.* Andrew J. Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at 247.

[9] *Ibid.*

[10] Landau, *supra* note 4 at 2.

Mediation found a fertile ground in family disputes because of a number of factors. First, the use of the formal systems of justice, despite the number of legal resources that became available in different jurisdictions, did not take away the high cost of litigating disputes and the waste of time that ensued. Second, the win-lose results produced by litigation made it very difficult for parties that needed to remain in a continuing relationship for the purpose of maintaining commitments to the child or children of the defunct union. Finally, questions relating to child custody and access are so complex in nature that the formal justice system could not, in any way, answer them satisfactorily.[13] However, mediation, with its flexibility and interest-based negotiation model, could be used by disputants to work out solutions.

## 1. Nature of Family Mediation

Family mediation can either be outside the judicial process or integrated into the court system. When it is outside the court system, trained mediators who are usually contracted by the disputants themselves provide mediation services. One distinguishing feature of this type of mediation is that although lawyers may refer clients to mediation, they do not usually appear with their clients at the mediation sessions.[14] This is because many issues that usually arise in family disputes, though very important to the parties, are emotional and not always legally relevant. However, where legal matters such as division of assets are at stake, lawyers may advise clients before mediation and be involved in the selection of the mediator. In order to ensure fairness it is ideal, and is the practice of many mediators, to encourage parties to seek the input of their lawyers before making any crucial decision during the negotiations.[15] In some jurisdictions, parties must have independent legal advice before a family law agreement can be signed.[16]

---

[11] See *Divorce Act, supra* note 7 at s.17 (5).

[12] In Ontario, for example, the court can order mediation with respect to custody and access, child and spousal support and the division of assets. See *Children's Law Reform Act*, R.S.O 1990, c. C12, s.31 (1). See also *Family Ac*t, R.S.O 1990, c.F.3, s.3.

[13] See Pirie, *supra* note 8 at 249.

As in other types of mediation, there is no minimum requirement with regard to training or educational qualification for joining the ranks of family mediators. Thus the field includes people of diverse profiles - lawyers, psychologists, social workers, and psychiatrists. The advantage of the diversity is that it enhances the quality of services provided to disputants, particularly when disputes are co-mediated. For example, through co-mediation lawyer-mediators are likely to use their knowledge of the law in helping disputants settle issues relating to asset sharing while the knowledge and experience of a psychologist-mediator or social worker will be helpful in preparing disputants for life after separation.

---

[14] *Ibid.* at 250.

[15] Landau, *supra* note 4 at 14.

[16] See *e.g. Matrimonial Property Act,* R.S.A 200, c. M-8, ss. 37 & 38 which provide that any agreement for the division of family property can only be enforceable if a party had acknowledged the existence of that agreement before a lawyer other than the lawyer acting for the other spouse or before whom the acknowledgment is made by the other spouse.

Court-annexed family mediation can be either voluntary or mandatory. Although court-annexed mandatory mediation programs are not new in Canada, such programs are rarely extended to family disputes.[17] This is probably because of concerns for the negative impact of unequal bargaining abilities, domestic violence, spousal abuse and power imbalances on weaker parties.[18] However, where mandatory family mediation exists, it is often connected to litigation and prohibits family disputes from getting beyond a particular point in the justice system unless the disputants have tried mediation. In the Provincial Court of Manitoba (Family Division) for example, parties must attend at least one mandatory mediation session before the court can hear any application for custody of or access to children.[19]

Mandatory family mediation is prevalent in the United States, and it is mostly used when child custody or access is in issue.[20] By 1991, for example, of about 205 court-related mediation programs for family disputes in United States, 75 required mandatory participation of disputants, 75 permitted judges to decide mandatory referrals on a case-by-case basis while only 55 made mediation voluntary by allowing either of the parties to initiate the process.[21] With regard to the issues dealt with, 109 of the 205 court-related programs were exclusively with child custody and access disputes.[22]

---

[17] See Pirie, *supra note* 8 at 252.Apart from the requirement of a minimum number of mediation hours, mandatory mediation also differs from voluntary mediation in a number of ways. The differences are discussed in detail in the context of court-annexed mediation in Chapter Three.
[18] See Cinnie Noble, *Family Mediation: A Guide for Lawyers* (Aurora, Ontario: Canada Law Books, 1999) 19.
[19] Landau, *supra* note 4 at 5.
[20] Connie & Sales, *supra* note 2 at 14.

The use of mandatory mediation in settling custody disputes in the United States probably influenced the introduction of mandatory case conferences in British Columbia.[23] It applies in contested protection proceeding and enables judges, especially those trained in mediation, to hold conferences with the parents of the child in question, the parents' lawyers, a social worker assigned to the case and a government lawyer. The likely evaluative interference by the judge in discussions among parties makes this process more like mini-trial than mediation. The essence is to raise the likelihood of settlement between parties. However, it is only when the dispute fails to settle in the conference that a date can be set for hearing.

Voluntary court-annexed family mediation is always in the form of referrals by the courts. Thus, as part of the case management powers of the court, an officer of the court can, when a case is filed, refer parties to mediation or the judge might, in the middle of proceedings, refer litigants in a family dispute to mediation. When the referral is made in the middle of proceedings, the case is often adjourned to such a time as to give parties opportunity to explore mediation as a settlement option.[24] However, as discussed in Chapter Three voluntary mediation may have a mandatory component in some jurisdictions. For example, once a referral is made, it cannot be refused. The choice of a jurisdiction to adopt mandatory or voluntary mediation is affected by some of the factors elaborated below.

---

[21] C. A. McEwen, N. H. Rogers & R. J. Maiman "Bring in the Lawyers: Challenging the Dominant Approaches to ensuring Fairness in Divorce Mediation"(1995) 79 Minn. Law. Rev 1317 at 1324.
[22] *Ibid.*
[23] See *The Child, Family and Community Service Act*, R. S.B.C. 1996, c.46, s.64.

## 2. Role of Mediators and Issues of Power

A recurring issue in family mediation is how to deal with power imbalance, which often exists between the disputants. Mediation is said to have an empowering effect, especially on weaker parties because it considers all the parties adults who are capable of engaging in rational discussions and decision-making.[25] In most cases it is hard to determine the veracity of such claim, particularly in a culture where men tend to be more powerful and dominant than women. Further, the general trend is still that, in times of dispute, men are usually more able "to purchase expert advice ... and therefore have greater knowledge about their legal rights as well as greater negotiating skills."[26] In mediation, it is easy for these harsh realities of existence to manifest in discussions between parties. However, a research study has shown that women can be helped through mediation to achieve fair outcomes and assume more responsibility in managing their affairs.[27] Thus, a problem confronting mediators is how best to maintain a level playing field between the parties without compromising neutrality in the process.

---

[24] See *ibid.* s.22.

[25] Peter Lovenheim, *Mediate, Don't Litigate* (York: McGraw-Hill Publishing Company, 1989) at 158.

[26] Katherine V.W. Stone, *Private Justice: The Law of Alternative Dispute Resolution* (New York: Foundation Press, 2000) at 129.

Mediators usually employ different process techniques to correct the imbalance. For example, the mediator may ensure that the weaker spouse is given enough time to speak or even require the submission of detailed budgets, in order to generate fair outcomes when financial matters are involved.[28] As fair as these techniques may seem, they hardly assure balance of power or correct other forms of inequalities that might exist between parties. As observed by Bryan, "[a] wife … may speak more than her husband, yet his few words may command her deference. The wife may submit a thorough budget, yet the budget may reflect her low expectation or her depression may blunt her ability to effectively negotiate for her financial needs as reflected in the budget."[29] The failure of some mediators to address the gender issues and the patterns of socialization in the society has not helped to correct the imbalance.[30] Further, the causes of power imbalance are often embedded in the socio-cultural values of a society and are not factors that mediators can rectify on their own. Attempts by mediators to intervene in the bargaining process may also conflict with the anticipated norm of mediator neutrality.

---

[27] In a study conducted in California, women reported that the mediation process had empowered them more than men did. Joan B. Kelly and Lynn Gigy, "Divorce Mediation: Characteristics of Clients and Outcomes," in K. Kressel and D.Prutt, eds., *Mediation Research: The Process and Effectiveness of Third –Party Intervention* (San Francisco: Jossey-Bass, 1989) 1 at 25.

[28] *Ibid.*.at 130.

[29] Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buff. L. Rev. 443 at 501.

[30] See *e.g.* Zoe Hilton, "Mediating Wife Assault: Battered Women and the 'New Family'" (1991) 9 C.J.F.L 29 at 36.

The effect of a power imbalance may be that the weaker spouse, who is often more eager to have the matter settled, accedes to almost all the demands made and ends up with an agreement prejudicial to his or her interest.[31] These are among the reasons why some lawyers are reluctant to embrace family mediation, and why mandatory mediation in family disputes is not as prevalent in Canadian judicial procedure. However, with the exceptions of cases involving physical abuse which most dispute resolution practitioners suggest are unsuitable for mediation, the perceived economic and social benefits of collaborative interest-based dispute resolution is gaining support among the Canadian Bar as evidenced in the spread of collaborative law movement across Canada.[32] Lawyers and spouses concerned about the possibility of being dominated in mediation should be cautious when selecting a mediator and consider those with knowledge of family law who are willing to intervene to block lopsided agreements.[33] It is also common in such situations for lawyers to participate in the mediation sessions, and, where a party participates without a lawyer, it is very important that he or she obtains independent legal advice before the memorandum of settlement is signed.

---

[31] Thomas E. Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds* (Urbana: University of Illinois Press, 1989) at 178.The impact of power imbalance on the weaker spouse is understandable. The stronger spouse often adopts the hard-bargaining style and may use threats of abandoning negotiations to obtain concession from the weaker party who usually avoids confrontation: see R. Fisher, W. Ury & B. Patton, *Getting to Say Yes: Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin Books, 1991).

[32] Collaborative law practice is a model of practice founded by Stuart G. Webb and a group of other family law practitioners in Minneapolis. It is a way of practicing law whereby the attorneys for all the parties to a dispute agree to assist in resolving conflict by using cooperative strategies rather than adversarial techniques. The attorneys and their clients show their good faith and commitment to collaborative negotiation by agreeing that the attorneys involved in the resolution of the dispute will withdraw from the matter if settlement efforts break down. It has gained ground among lawyers in North America because it works. See *e.g.* Richard W. Shields, Judith P. Ryan & Victoria L. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* (Scarborough, Ontario: Thomson Carswell, 2003) for more details about collaborative family law model.

## B. Commercial Disputes

Long before mediation became popular as a dispute resolution method, merchants and businessmen had been using non-traditional dispute resolution processes for disputes arising from their transactions. The motive for their attitude was the desire to avoid law, technicalities, and delay and to retain control of their own affairs.[34] Auerbach observes that the desire of merchants to avoid the pitfalls of the formal justice system was more powerful than the "force of law" and was fuelled by "the collective conscience of a group" that was eager to break free from the negative consequences of using the formal system in resolving disputes among themselves.[35] Thus, for many years business people had always attempted to settle their commercial disputes by either negotiating with each other or submitting their disputes for arbitration, which, though adversarial, still enables them to avoid delay and retain control of their affairs.

---

[33] See Loveinheim, *supra* note 25 at 162.

[34] See Jerold S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983) at 5. It has been argued that non-adversarial methods of resolving disputes tend to flourish in communities or within a group of people that share the same degree of commitment to communitarian values even when they live in a culture that is predominantly adversarial. Examples of such groups are the Chinese and the Scandinavians that settled in the United States. For the merchants the bond lies in their collective desire to maximize profits, reduce cost and enhance existing business relationships, values that are rarely advanced by the formal justice system. See *Ibid*.

[35] *Ibid*. It is important to point out that arbitration also became popular among the business class because of these factors.

The advent of mediation meant that business people could still enjoy the benefit of negotiating between themselves while retaining a neutral party to facilitate such negotiations. As a result of the experience of most business people in interest-based negotiations, it was relatively easy for the mediator to understand the underlying interests in the dispute, through caucusing. Thus, mediation has proven helpful in the resolution of commercial disputes relating to contract, construction, consumer complaints and product liability.[36]

## 1. Rationale and Nature of Commercial Mediation

The context of commercial mediation largely determines its nature. It is usually voluntary when mediation services are provided by trained mediators outside the court system. Business people that wish to utilize this medium in resolving their disputes usually insert mediation clauses in their contracts which clarify issues to be submitted to mediation, how the mediator shall be chosen and steps to take if the dispute fails to settle through mediation. Where there is no pre-dispute agreement regarding mediation, parties may still at any point in the course of their dispute, decide to make use of mediation. On the other hand, mandatory commercial mediation is often found in court-annexed mediation programs designed to decongest the courts by taking as many commercial disputes as possible away from the litigation process.[37] However, neither the context in which commercial mediation occurs, nor the presence of the mediator, takes away the power of business people to negotiate and resolve their disputes their own way as they would usually in their normal interest-based negotiations. Apart from this, mediation has also been very popular among business people because of other advantages that it brings.

---

[36] Lovenheinm, *supra* note 25 at 176.

First, the competitive nature of contemporary economies means that business people place a high premium on maintaining good relationships with commercial partners as well as individual customers.[38] To remain in business, business people seek to maximize profits by making the best use of available resources. The key to realizing this objective is keeping their sources of supply as well as their markets open and seeking to expand them where possible. Compared to other disputing resolution methods such as arbitration and litigation, mediation is more sensitive to the needs of business people and has greater potential for preserving existing business relationships because of the win-win results that it usually generates.

Research studies conducted in the United States suggest that the desire to preserve business relationships is one of the most important reasons for the preference of mediation in the resolution of business disputes.[39] In Canada, it been has observed that despite the problems of court-connected mediation, business people in Ottawa and Toronto still embrace the Ontario mandatory mediation as it enables them to keep settlement discussions alive while cases are pending in court.[40] Settlement in this context is very important for the rehabilitation of relationships that have probably been fractured by litigation.

---

[37] The nature and features of the court-annexed mediation programs across Canada are analyzed in Chapter Three of this thesis.

[38] John Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000) 5 Harv. Negot. L Rev. 137 at 224.

Second, in contrast to litigation, mediation is relatively fast and cost-effective. In the business world, costs are not restricted to legal fees paid for pursuing cases, but broadly defined to include diversion from productive activity of corporate manpower assigned to cases in court, capital tied up by reason of having those cases, lost opportunities and damaged business relationships.[41] Mediation saves parties from incurring such costs while resolving their disputes, as cases can be settled inexpensively, in a matter of hours with the aid of a mediator. This is often possible since business people are usually adept in interest-based negotiations and also share a common interest - the need to avoid waste of resources while trying to resolve their disputes.[42]

---

[39] *Ibid.* at 186.In survey interviews conducted by John Lande involving 178 respondents which included 78 private legal practitioners, 58 in-house co-operate lawyers and 50 business executives selected from Massachusettts, Pennsylvania, Tennessee, and Florida had an overall response rate of 66%. It was found that 80% believe that mediation helps in preserving business relationships. This finding is consistent with the result of another survey involving 606 in-house counsel from Fortune 1000 companies in which 59% of respondents said that one of the reasons they use mediation is to preserve relationships: See David B. Libsky & Ronald L.Seeber, " In search of Control: The Corporate Embrace of ADR" (1998) 1 U.Pa.J. Lab & Emp't L. 93 at 139.

[40] Julie Macfarlane, "Culture Change? Commercial Litigators and Ontario Mandatory mediation Program" online: Law Commission of Canada <http: www.lcc.gc.ca> at 43.

[41] Bonita J. Thomson, "Commercial Dispute Resolution: A Practical Overview" in D. Paul Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ontario: Canada Law Books, 1989) 89 at 103. See also Noel Rea, "One Counsel's Experience with introducing Alternative Dispute Resolution (ADR) in a Corporate Setting" (2006) 9 C.F.C.J: News & Views on Civil Justice Reform at 9 for the insight into what constitutes costs from the perspectives of business organisations.

Unlike litigation where business people usually pursue their claims in accordance with professional decisions taken by their lawyers, mediation gives business people the opportunity to actively participate in the resolution of their own disputes. Parties are likely to settle their cases in mediation when they consider settlement to be in their best interest. Sometimes, the underlying interests of parties might not be known to their counsel. This is more evident in most court-annexed mediations as court rules mandate that mediation be done early, mostly before discoveries are conducted.[43] Mediating cases at a time when lawyers are yet to acquaint themselves with all the facts and issues involved in a case means that they depend more on their clients in the settlement discussions. The result of this is the growing influence of in-house counsel who "are oriented towards the overall efficiency of their organisation(s)" in managing and resolving business disputes.[44]

Finally, the confidential nature of mediation can shield business people from publicity. This is very important in maintaining reputation and minimizing losses. For example, a company that is sued by one of its customers for selling defective product will likely opt to mediate the dispute rather than litigate it. With mediation, the company may prevent the damage such dispute can have on its image as well as subsequent suits from consumers who may want to make money by reason of the error.

---

[42] Studies suggest that saving time and money is the most important reason business people use mediation and other ADR methods: Lande, supra note 37 at 185.See also Bobbi McAdoo, "A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil litigation Practice in Minnesota." (2002) 25 Hamline L. Rev. 401 at 408.

[43] See Michael P. Silver, *Mediation and Negotiation: Representing Your Clients* (Toronto: Buuterworths, 2001) 155. See also Macfarlane, *supra* note 40 at 62 where it is observed that one of the effects of mandatory mediation in Ontario is that commercial clients depend less on the commercial litigators for directions to take in settling their disputes.

[44] Macfarlane, *ibid.*

It was in response to the problems involved in litigation that a group of large and mid-size U.S. companies agreed to use ADR processes as starting points for any business dispute arising between them. Parties to the agreement declared that for "any dispute between our company and another company which has made or will make a similar statement, we are prepared to explore resolution of the dispute through negotiation or ADR techniques before pursuing full scale litigation."[45] In addition to this commitment, about 1,500 law firms agreed to use ADR processes in resolving business disputes and to always advise their clients on appropriate ADR methods.[46] A Canadian response was the establishment of the Canadian Foundation for Dispute Resolution in 1994 by the Association of General Counsel of Alberta and several large law firms in Calgary.[47] The Foundation is now a subsidiary of the ADR Institute of Canada, which was founded in 2000. The Institute, like the Canadian Foundation for

---

[45] Pirie, *supra* note 8 at 271. The declaration, otherwise called the ADR pledge was an initiative of the Center for Public Resources to encourage faster, more-efficient and less expensive methods of resolving business disputes in the United States. As in the collaborative family law practice, the participating companies and firms showed their moral commitment and desire to minimize the problems associated with resolving business disputes through the formal justice system.

[46] *Ibid*.

[47] Rea, *supra* note 41 at 11.

Dispute Resolution, fully supports the use of ADR processes for commercial disputes and has been encouraging corporations and law firms to sign a Protocol similar to that which was developed in the United States.[48] To date this has not occurred. However, mediation and other ADR methods are still very much favoured by business people and this trend is being reflected in corporate policies of many organizations.[49]

## C. Potential Problems in Mediation in Family and Commercial Contexts

Despite the attraction of mediation in family and commercial contexts, there are areas of concern for both mediators and disputants. The effectiveness of mediation in these and other classes of disputes may depend on how these concerns are addressed, namely: mediator's knowledge and skills, liability of mediators, and confidentiality of communications. These concerns are also of particular interest and are usually addressed in court-annexed processes. The first two concerns are discussed below while the issue of confidentiality of communications is discussed as the last part of this chapter. Examples drawn from commercial and family law contexts are used to illustrate the points made.

---

[48] See Pirie, *supra* note 8 at 271.

[49] See Rea, *supra* note 41 at 12.

### 1. Mediator's Knowledge and Skills

Provincial laws have not set down specific training requirements for mediators. Rather, in most provinces mediation and arbitration societies offer training and keep a list of people who have completed their courses. Practical training is often acquired through volunteering with community mediation services or co-mediation with experienced mediators. People of diverse backgrounds are also placed on court and other rosters if they complete training requirements of a particular mediation organisation.

Among mediators there is consensus that competence in mediation involves a clear mastery of the process of mediation rather than the subject matter of the particular dispute being mediated.[50] For example, competent mediators make use of different mediating styles and techniques, past experiences, and skills acquired in training to create an atmosphere for good faith and honest discussion between parties; educate parties about the goals of mediation and rules that guide the process; and discover the factual information about the dispute and the underlying interests of the parties.[51] They also have the ability to understand each party's perspective and utilize techniques such as brainstorming to help parties generate options for mutual gain. Mediators do this without necessarily being experts in the subject matter of the disputes they mediate.

---

[50] See Cinnie Noble, L. Leslie Dizgun & D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998) at 46; see also Stone, *supra* note 24 at 43. This point manifests clearly when the classic-facilitative style of mediation is adopted.

[51] See *e.g.* Society of Professionals in Dispute Resolution (SPIDR), *Qualifying Neutrals: The Basic Principles: Report of the SPIDR Commission on Qualifications* (Washington, D.C: National Institute for Dispute Resolution, 1989) at 11; See also G.A. Chornenki & C.E Hart, *Bypass Court: A Dispute Resolution Handbook* (Toronto: Butterworths, 1996) at 89 – 90; L. Boulle & K. J. Kelly, *Mediation, Principles, Process and Practice* (Toronto: Butterworths, 1998) at 163, for the features constituting the "tool box" of skills and techniques at the disposal of a competent and experienced mediator.

However, in some areas being versed and competent in a specific subject area may give the mediator a better grasp of the issues at stake and increase confidence of the parties to the dispute in the mediator's ability. This is often vital in commercial disputes where the stakes are high. For example, it may be very difficult for a mediator who is not knowledgeable in law to know the right questions to ask or appreciate the position of a hockey player who is demanding hundreds of thousands of dollars for improper use of his image by the club that hired him. It might be easier for the issues in dispute to be identified and creative options generated if the mediator knew what might constitute infringement of the player's rights. The mediator's knowledge and expertise may also come in handy during caucusing, which is the stage at which the mediator, having gained the trust of the party, may "probe and point out weaknesses in the party's position, suggest new ways of looking at their position, or open their minds to the other side's way of looking at the issues."[52] For example, when division of assets acquired during marriage is in issue, a mediator with a legal background is likely to educate parties during caucusing, about the rules to be applied by the court if the matter is to be litigated.

---

[52] Yaroslav Sochynsky, "Mediation: A Guide For Practitioners" in *California ADR Practice Guide* (Washington D.C.: The American Law Institute, 1996) reprinted in Stone, *supra* note 26 at 40.

When a party is represented, it is the duty of his or her counsel to determine the suitability of a mediator's knowledge and skill for the dispute in question.[53] This requires finding out particular areas of expertise of different mediators, their styles of mediation and the experiences they might have had in mediating similar disputes. The information obtained will be vital whether in private or court-annexed mediation, in either choosing a particular mediator from the roster or outside it or rejecting the choice made by the other party.

### 2. Mediator's liability for Negligence and Incompetence

Although it is not yet common practice for aggrieved parties to sue a mediator for misconduct or other acts they perceive resulted in an unfair agreement, mediators are nonetheless potentially liable for their acts or omissions in respect of matters they mediate. In the words of Folberg and Taylor:

> A mediator could conceivably be sued for fraud, false advertising, breach of contract, invasion of privacy, defamation, outrageous conduct, breach of fiduciary duty, and professional negligence or malpractice. One event or set of facts may lead to liability, or at least a lawsuit, on several different legal theories or causes of action. The two that are most likely to be the basis of a legal claim against a mediator are breach of contract and professional malpractice.[54]

Specialization and expertise are highly regarded in the business world and they mean much to business people when they are competitively priced. A mediator who practises in any of the commercial areas may advertise him or herself as an expert who can render faster and cheaper services in that area. It is possible for a party who is not satisfied with the mediator's performance to allege a breach of contract against the mediator, if he or she agreed to contract the mediator relying on the special skills and experience claimed and the terms on which the services were offered.[55]

---

[53] See Noble, *supra* note 50 at 60 – 63 for a checklist of questions to guide counsel in determining the extent of mediator's knowledge and skill.

[54] Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey- Bass, 1984) at 281.

Mediators could also be held to a standard of care suitable to their level of skill and experience under the tort of negligence. If mediators can claim professional status for their practice, it is only fair that they be expected to observe a certain degree of care in the conduct of their businesses and be held liable on account of negligence and malpractice whenever they are found wanting.[56] However, it may be hard to establish negligence since the mediation process requires an exercise of judgement in respect of questions to raise about issues in dispute, how and when to raise those questions, as well as when and how to take care of certain emotions of the disputants to achieve maximum result. These questions, among others, are likely to determine the success or otherwise of the mediation process and it behoves the mediator to make the right judgment at every particular point in the process.[57] The difficulty in determining negligence where exercise of judgment is involved is evident in the legal profession where a barrister can be held liable for negligence in the courtroom but not for "a mere error of judgement" committed in the general conduct of the client's case. Illustrating the difficulty, Justice Krever remarks:

---

[55] There is yet to be any reported case of that kind in Canada. However, Pirie argues that a court can hold offers such as that as constituting terms of the contract between the mediator and the disputant who engaged his or her services. That being the case, a mediator is likely to be liable in the event of a breach of any of those terms: Andrew J. Pirie, "The Lawyer as a Third Party Neutral" in D. Paul Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ontario: Canada Law Books, 1989) 27 at 51.

[56] Mediators themselves have recognized this fact. So, while there are no universally accepted standards of practice for all mediators, different mediator-organizations have developed professional guidelines for their members. For commercial mediation in Canada, for example, the rules of practice developed by the British Columbia International Commercial Arbitration Centre as well as similar rules in other provinces should provide direction for what constitute the mediator's responsibilities.

> Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgement. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence.[58]

As pointed earlier, mediators can protect their practice from lawsuits by dissatisfied parties by educating disputants about the need to seek legal counsel before going into a mediation session and for the purpose of vetting the settlement agreement before it is signed by such party.

### 3. Confidentiality of Communications

Mediation, which was merely touted in the early years of the ADR movement as one of the new "vehicles" capable of taking the justice system out of the woods, has developed into an important and distinct profession in common law jurisdictions.[59] Menkel-Meadow observes that it has "in a relatively brief span of time…evolved from a bold, innovative challenge to conventional methods of decision making and dispute resolution to a more professionalized and institutionalized practice."[60] Crucial to the practice and success of mediation in family, commercial and other contexts is the confidentiality of communications made to the mediator and those exchanged between parties. According to Lon Fuller, the mediator's assistance

---

[57] It is likely that incompetence on the part of mediator who lacks the necessary skills will manifest and when it does, the court will not have any difficulty in holding the mediator liable for negligence or any other type of malpractice. On the other hand, ignorance of the mediation process on the part of the disputants may also be dangerous, because it is possible for an ignorant disputant to complain that he or she suffered damages of the mediator's inability to help he or she negotiate a better deal. See *e.g. Lange v. Marshall* (1981) 7 Fam. L. Rptr.2583 (Mo. Ct App.). Although it is very unlikely that inappropriate arguments such as this may sway any court, it is desirable that disputants be informed about the role of the mediator before the commencement of any mediation session.

[58] *Demarco v. Ungaro* (1979) 95 D.L.R (3d) 385 at 405. (Ont. H.C)

> …can speed the negotiations, reduce the likelihood of miscalculation, and generally help the parties to reach a sounder agreement, an adjustment of their divergent valuations that will produce something like an optimum yield of the gains of reciprocity. These things the mediator can accomplish by holding separate confidential meetings with the parties, where each party gives the mediator a relatively full and candid account of the internal posture of his own interests. Armed with the information, but without making a premature disclosure of its details, the mediator can help to shape the negotiations in such a way that they will proceed most directly to their goal, with a minimum of waste and friction."[61]

It is doubtful whether the mediator, who lacks the authoritative powers of either the judge or an arbitrator, can function effectively without a guarantee of confidentiality to the parties. As the mediator cannot compel parties to reveal any information, a promise of confidentiality is the only reason for parties to reveal facts and motives that they might otherwise withhold from everybody. Parties must feel safe to discuss all the relevant and underlying issues in their dispute, particularly those issues and facts that may otherwise impede settlement.[62] Mediation is "impossible if the parties [are] constantly looking over their shoulders" when they are at the negotiating table.[63] Disputants need to be candid both with each other and with the mediator. However, the feeling of candour and safety can only arise if parties know that anything revealed in the process will not prejudice their position, if the matter proceeds to adjudication.

---

[59] Hon. Warren E. Burger identified the theme of the Pound Conference of 1976 as a search for new vehicles to take the people to where they would want to go in the years ahead. The methods put forward by Professor Sander became the new vehicles for the envisaged journey. See Frank E. Sander, *Varieties of Dispute Processing* (St. Paul, MN: West Publishing Co, 1976) at 113 for details regarding the features of the new methods.

[60] C. Menkel -Meadow," The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" (1995) 11 Negotiation J. 217.

[61] L.L Fuller," Mediation – Its Forms and Functions" (1971) 44 Cal. L. Rev. 305 at 318.

Confidentiality is a very important aspect of all settlement negotiations.[64] However, the involvement of the mediator makes settlement through mediation even more delicate and the need for confidentiality more imperative. As discussed earlier in this thesis, for the mediator to assist the parties, he or she must not only understand the issues in dispute but also the motives and the underlying interests of each party. The mediator might act as a sounding board by helping one party assess the feelings of another with regard to any issue in dispute, engage in the assessment of any option a party might come up with, and assist in generating options that might be used in settling the dispute.[65] All these the mediator can do by adopting different skills and strategies at the various stages of negotiation to extract vital information from the disputants. Mediation will not be successful if the parties feel free to talk with the mediator only and not with each other.

---

[62] See Jay Folberg & Allison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (San Francisco: Jossey-Bass,1984) at 263-265. The authors argued that confidentiality of communications should include privacy from public discourse which means that mediators should not discuss with other people, that is, the public what has been revealed to them in the mediation, unless such revelation is by express agreement of all the participants, order of court or compelled by law. Mediators should also describe the extent of confidentiality to the participants.

[63] Lwarence R. Freedman & Michael L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986) 2 Ohio St .J. Disp. Resol. 37 at 38.

[64] See Owen V. Gray, "Confidentiality in Mediation" (1998) 36 Osgoode Hall L. J. 667 at 671.

Confidentiality is also vital in maintaining the neutrality of the mediator. Neutrality is affected if a mediator appears in court to testify at the instance of any of the parties, or even the court, regarding information that comes to his or her knowledge during a mediation session. Taking away the neutrality of the mediator means destroying the foundation of mediation itself. The appearance and the reality of the mediator's neutrality are essential to generating the climate of trust necessary for effective mediation. For the above reasons, the confidentiality of mediator-party and party–party communications ought to be protected and is protected to varying degrees in court-annexed processes.

Some commentators have argued that in order to ensure the integrity of mediation, mediators should be allowed to invoke a privilege similar to that enjoyed between lawyers and their clients, with regard to information obtained during mediation, even if parties waive confidentiality.[66] Privilege is particularly important in court-annexed programs where parties may be afraid that if they fail to reach a resolution, everything that transpired at the mediation will be transferred to the courtroom.[67] Others believe that law should provide for a "blanket" protection for all communications made during mediation. In that event, neither the parties nor the mediator could be subpoenaed to testify with regard to facts revealed during mediation.[68]

---

[65] See C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed. (San Francisco: Jossey-Bass, 1996) at 319 -320.

[66] Michael A. Perino, "Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act" (1995-1996) 26 Seton Hall L. Rev.1 at 9.

As desirous as confidentiality of mediation communications can be, "blanket" or absolute coverage may encourage rather than prevent the abuse of the mediation process. Gray observes:

> Enforced confidentiality can be a burden as well as a benefit. To the extent that what is said and done during mediation cannot be the subject of testimony in any subsequent proceeding, rights and remedies that might otherwise flow from the words or actions of other participants cannot be enforced and do not effectively exist. The participants are in a different legal regime when they enter the defined circumstances.[69]

Abuses of the mediation process such as bad faith, illegal conduct or fraud by the mediator or any of the parties, should be exposed. Mediation protection ought to include exceptions which are necessary for the purpose of enhancing the integrity of the mediation process.

Confidentiality of communications made at mediation is ensured by three methods: confidentiality agreements signed by all the participants, common law and statute. The legal issues involved in each of these methods are examined below.

---

[67] See *ibid.* at 7.

[68] See Lawrence Freedman, "Confidentiality: A Closer Look" in Larry Ray, ed., *Mediation and the Law: Will Reason Prevail?* (Washington, DC: American Bar Association, 1983) 68 at 71.

[69] Gray *supra* note 64 at 685.

### [i] Confidentiality Agreements

It is common practice for mediators to ask parties to sign a confidentiality agreement at the commencement of mediation.[70] The agreement may be expressly couched as an "Agreement to Mediate" or may take the form of a "Consent Form." In whatever form it appears, the idea is to "assert a client's consent to voluntarily waive the right to use any of the communications made in mediation in subsequent legal proceedings and the right to subpoena the mediator or the records from the mediation centre."[71] As effective as agreement of the parties may seem, there are limits on the ability of such agreements to maintain confidentiality.[72] There are situations in which the mediator or participants may be obliged by an existing law to reveal information, which would ordinarily have been covered by the confidentiality contract. For example, in its bid to protect minors, the law in many jurisdictions requires that information regarding harm done or a risk of harm to a child, be reported to the appropriate authorities.[73] A rule of court or tribunal may also require the mediator or participants to give evidence on facts that came to their knowledge by reason of his participating in mediation.[74] If such situation arises, the parties' obligation under the initial contract must yield to the requirement of the law.

---

[70] Stone, *supra* note 26 at 60.

[71] Erin L. Kuester, "Confidentiality in Mediation: A Trail of Broken Promises" (1994-1995) 16 Hamline J. Pub. L. & Pol'y 573 at 577.

[72] Gray *supra* note 64 at 673.

[73] See *e.g. Child and Family Services Act*, R.S. O.1990, c. C-11, s.72.

[74] See Gray *supra* note 64 at 673.

A confidentiality agreement may also be declared void for being contrary to public policy "to the extent that it purports to prevent the introduction into evidence of relevant information not privileged from disclosure as a matter of law."[75] However, this is a path that is rarely followed by courts probably as a result of a growing recognition of the importance of mediation to the administration of justice. In fact, it has been argued by Lord Denning that by entering into a confidentiality agreement each of the parties has encouraged the other to reveal confidential information, which neither may then use as "a springboard for activities detrimental to the person who made the confidential communication."[76] As persuasive as this view is, the fact is that the protection given to mediation by the confidentiality agreements is incomplete. The "Agreement to Mediate" is a contract that binds only the contracting parties. There is no magical quality about it that makes it possible to bind third parties. Such agreements cannot prevent strangers to the contract from seeking or even disclosing information from mediation proceedings.[77]

In the United States, a federal rule relating to settlement discussions prevents the admissibility of statements made in such process in subsequent litigation between the parties, but the rule is less clear on its application to communications between one of the parties to a settlement and an unrelated third party.[78] However, the U.S courts tend to interpret the rule in light of the public interest of encouraging parties to pursue non-litigious solutions to disputes. Thus, settlement discussions are generally not admissible even when the party seeking to admit them is a total stranger to any confidentiality contract that might have restricted the admissibility of such information. For example, in *Scaramuzzo v. Glenmore Distilleries Co.* the court refused to allow an age discrimination plaintiff to introduce evidence of settlements that the employer had negotiated in other similar cases.[79] According to the court:

---

[75] Freedman & Prigoff, *supra* note 63 at 41.
[76] *Seager v. Copydex Ltd.* [1967] 2 All E. R 415 at 417 (C.A).
[77] Freedman & Prigoff, *supra* note 63.

> Though [Rule 408] does not appear to go directly to the question of whether a plaintiff may introduce evidence regarding defendant's settlement of other similar cases, the same strong public policy favouring out-of-court settlement that underlies Rule 408 is nonetheless applicable. It would be logically inconsistent to uphold the vitality of Rule 408, while at the same time holding that a settlement offer could be used against the offeror in related cases. An offer of settlement can be of no legal relevance as to the offeror's liability, irrespective of whether the offer was made in the instant case or in a related case…"[80]

### [ii] Common Law Protection

It is the tradition of adversarial litigation that, for justice to be done in any matter that comes before a court or tribunal, all relevant evidence relating to the issues in dispute be available to that court.[81] To that extent, a court or tribunal can make use of its inherent powers to ensure the attendance of witnesses whose testimonies may be necessary for the just adjudication of the dispute. However, there are instances when relevant, trustworthy, and probative evidence may be excluded to uphold a judicial or public policy consideration that outweighs the public interest in admitting all relevant evidence. Thus, a number of confidential communications have been held as privileged and therefore inadmissible at common law.[82]

---

[78] James J Restivo, Jr & Debra A. Mangus,"Alternative Dispute Resolution: Confidential Problem-Solving Or Every Man's Evidence?" (1984) 2 Alt'tives to High Cost of Litigation 5 at 6.

[79] 501 F. Supp.727 (N.D 111.1980).

[80] *Ibid.* at 733.

[81] Gray, *supra* note 55 at 675.

One can argue that the protection which communications made at mediations enjoy at common law is derived from the time-hallowed tradition of excluding evidence arising from settlement discussions. In the words of Lord Mansfield, "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due."[83] Communications made during settlement discussions are, oftentimes, referred to as "without prejudice" communications and there are a number a number of reasons for the privilege they enjoy at common law.

The main justification for the inadmissibility of settlement communications is the public policy of encouraging settlement by parties to a dispute who chose to avoid the delay, costs, inconvenience and hostility that characterize litigation. The law understands that settlement negotiations usually involve admissions and compromises by parties who might be interested in showing their good faith in order to smooth the path to settlement.[84] Privilege exists to exclude the use of admissions made at such discussions, if the parties fail to reach settlement. Explaining the importance of this policy, Clauson J. says:

---

[82] Some relationships such as attorney-client and doctor-patient have traditionally been recognized at common law. See *R v. Gruenke* [1991] 3 S.C.R. 263 at 295.

[83] Buller's *Nisi Prius* (7th ed. 1817) 236b cited in David Vaver, "Without Prejudice" Communications – Their Admissibility and Effect" (1974) 9 U.B.C L. Rev 85 at 88.

> The principle seems to depend upon this, that the Court has always taken the view that every facility is to be given to persons who are in litigation, to anticipate litigation, to come together fully and frankly, to use a popular expression, to place their cards upon the table, with a view to coming to some arrangement, and if that is the position, statements and admissions made under those circumstances will not be treated as admissions against the parties.[85]

The law relieves the parties the embarrassment and prejudice that might be caused if admissions are allowed in evidence. The rule is also consistent with the argument that courts should enforce minimum standards of fair play in the way parties obtain and use evidence and no party should have the court's support in his or her desire to turn the good-faith efforts of another party to his or her personal advantage, in the event that settlement discussions fail.[86]

Another rationale for the exclusion of settlement discussions is that negotiations proceed on an agreement or understanding between parties that discussions are without prejudice to their respective rights. Therefore, no information exchanged during negotiations should be used by any of the parties without the consent of the other party.[87] Concessions and admissions made in settlement negotiations are always with the implied condition that they may either be accepted or rejected, depending on what the parties might consider sufficient for the purpose of resolving their dispute outside the court. They usually do not reflect the maker's belief in such a manner as to constitute admission as contemplated by law.[88]

---

[84] *Ibid.* at 94.

[85] *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C 151 (K.B) at 156 – 157.

[86] See G.M. Bell, "Admissions Arising out of Compromise – Are They Irrelevant?" (1953) 31 Tex. L. Rev. 239 at 244.

[87] See *Rabin v. Mendoza* [1954] 1 W.L.R 271 (C.A) at 277.

The privilege enjoyed by "without prejudice" communication does not arise in all situations where parties are in confidential relationship with each other. Such communications can only be considered as privileged if the following four conditions, known as the "Wigmore" test, are satisfied.

> (1) The communications must originate in a confidence that the parties believe they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[89]

The above criteria have been confirmed by the Supreme Court of Canada.[90] In *R v. Gruenke* the court classified privileges into two categories: "class" or "blanket" privilege and "case-by-case." In class privilege there is a presumption of inadmissibility of communications between parties, once it is shown that their relationship falls within the class. However, the presumption can be rebutted if the party seeking to have the evidence admitted can show that the communication falls within an exception to the rule. Communications between parties in a relationship not covered by class privilege are presumed admissible and can only be treated as privileged if they satisfy the four conditions that constitute the Wigmore test. The court should apply the test on a case-by-case basis and each case is to be considered entirely on its merit.

---

[88] See Vaver, *supra* note 83 at 101.
[89] J.H. Wigmore, *Evidence in Trials at Common Law*, rev. by J.T McNaughton (Boston: Little Brown, 1961) vol. 8 at para.2285.
[90] See *Slavutych v. Baker* (1976) 1 S.C.R. 254 at 262; See also *R v. Gruenke, supra* note 60 at 286-87.

In *Gruenke*, the court was confronted with the issue of the admissibility, in a murder trial, of statements made by an accused to her church pastor and a lay counsellor concerning the murder. The Supreme Court held that there would be no justification for a "class" or *prima facie* privilege for communications between a clergyman and penitent unless the reasons to support such a privilege were as compelling as those upon which the solicitor-client privilege was founded.[91] Chief Justice Lamer held that:

> [t]he prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication...[92]

The rationale behind the lawyer-client privilege is that the interest of the public will be better served if clients are encouraged to confide in their lawyers fully and candidly. Such free flow of communication is no doubt necessary for administration of justice.[93]

---

[91] *Gruenke, ibid.* at 288-89.

[92] *Ibid.*

The decisions of the Supreme Court of Canada in the cases of *Slavutych v. Baker* and *R v. Gruenke* have been followed by other Canadian courts in respect of mediation communications in family, commercial and other contexts. Every case is considered on its merit and evidence of a mediator is held inadmissible if the Wigmore's four conditions are satisfied. For example, applying the test in a divorce proceeding, the court held inadmissible the report of a psychologist who had previously acted as a mediator between the parties in their custody and access dispute.[94] The court was of the opinion that parties should be encouraged to settle their matrimonial disputes with the aid of a mediator, and by engaging in frank and open discussion that might lead to arrangements consistent with the interests of children. Also, in *Sinclair v. Roy*[95] the British Columbia Supreme Court held that communications made in an unsuccessful access mediation formed part of settlement negotiations which were privileged. Consequently, a subpoena issued to a family court counsellor who mediated the dispute was set aside.

---

[93] In more recent times, it has also been argued that the citizen's rights and privacy ought to be protected from the intrusion of law and government. Commenting on this point Deane J. says "without [legal professional privilege] there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents": *Baker v. Campbell* (1983) 49 A.L.R 385 at 436-437 (S.C. Australia).

[94] *Porter v. Porter* (1983) 40 O.R (2d) 417 at 421.

[95] (1985) 20 D.L.R. (4th) 748 (B.C.S.C.) See also *Bates v. Bates* (1992) O. J. No 6869 Ont. Ct 9(Gen. Div.); *McDonald v. McDonald* (1987) 6 R.F.L (3d) 17 (B.C S.C) at 22; See also J. Folberg, "Confidentiality and Privilege in Divorce Mediation" in J. Folberg & A. Milner, eds., *Divorce Mediation :Theory and Practice* (New York: Guildford Press, 1988), for further details on confidentiality of mediation in family context.

### [iii] Protection under Statute

Unlike the United States, where every jurisdiction is guided by Rule 408, a Federal Rule of Evidence that provides for the protection of communications made in settlement negotiations, there is no such rule with universal application in Canada.[96] However, some federal enactments that provide for the use of mediation have clauses that protect communications made at such mediation sessions. For example, in disputes with federal government involving agricultural operations:

> [E]vidence arising from anything said, evidence of anything said, or evidence of an admission or communication made in the course of mediation is not admissible in any cause or matter or proceeding before a court, except with the written consent of the mediator and all parties to the cause or matter in which the mediator acted."[97]

Provincial jurisdictions, on the other hand, provide far more comprehensive protection for communications made in mediation through the various court rules. In Ontario, for example, the mediator's notes and record as well as communications made at a mandatory mediation session are deemed to be "without prejudice" settlement discussions and are therefore inadmissible.[98] Although all the court-annexed processes include provisions relating to confidentiality, they differ in form and context from province to province. The following chapter examines how facilitative mediation and associated issues such as confidentiality are incorporated into the judicial procedures of the Canadian provinces of Ontario, Alberta, Saskatchewan, and British Columbia and the success of such programs.

---

[96] See Federal Rules of Evidence, C.F.R. § 408 (2004).

[97] *The Agricultural Operations Act*, S.S 1995, c.A-12.1, s.16 (7); See also *Canadian Environmental Assessment Act*, S.C 1992, c.37, s.32 (2).

[98] Ontario, *Rules of Civil Procedure*, r.24.1.14.

# CHAPTER THREE

# COURT-ANNEXED MEDIATION IN CANADIAN JURISDICTIONS

## A. Introduction

Court-annexed mediation refers to mediation that is integrated into the court system. It may be available as a voluntary process to be utilised by potential litigants or mandated by statute or rules of court as part of litigation process.[1] A mediation program need not be physically attached to the courthouse for it to qualify as court-annexed; it is court-annexed if its only connection to the court is that there is procedural rule allowing it.[2] It is ironic that seemingly odd bedfellows like adjudication and mediation would eventually co-habit the same court.

The idea of annexing mediation to the civil justice system came up for two reasons. First, as elaborated in Chapter One policy makers perceived mediation as a process that would save both money and time. As argued by some mediation advocates, mediation because of its cost-effectiveness, flexibility and timeliness in settling disputes, can help courts reduce the volume of cases litigated.[3] In addition to these features, is the belief that mediation brings satisfaction with the judicial process.[4] These features were essentially what the courts needed in face of increasing dockets, reduced resources, delay and litigants' dissatisfaction occasioned by the slow pace of litigation.

---

[1] Alberta Justice, *Report of the Working Committee on Court-annexed Mediation in Civil Matters* (Edmonton: Alberta Justice, 2002) at 2. However as should be shown later in this chapter most court-annexed mediation programs have little or no room for voluntary mediation.

[2] The Notice to Mediate Program in British Columbia, for example, has no physical connection with any court. See *ibid.* at 6.

[3] Nancy Welsh, "The Lawyers' Buffet: Options in Resolving Disputes" (1987) Bench & Bar of Minn. Nov. at 17. See also Thomas Radio, "Advising Your Client Regarding ADR" (1989) Bench & Bar of Minn., April at 19; However research suggests that the use of mediation in the judicial process has not necessarily resulted in the reduction of the cost of disputing or in quicker

The second reason for the courts' adoption of mediation was that society took to it when it appeared that mediation would actually work in the settlement of disputes.[5] The wide-spread acceptance enjoyed by mediation and the boom in the practice of private mediators destroyed the scepticism of many members of the legal community who were hitherto opposed to the ideals of mediation.[6] As years passed, the interest of members of the legal community in mediation increased and a large number of lawyers trained as mediators.[7] Eventually, some lawyers and judges who had become mediation advocates became members of committees, commissions and other groups advocating reform of the judicial process. Armed with the requisite powers and influence, they started

---

settlements. For example, an evaluation of the use of mediation and early neutral evaluation as mandated under the Civil Reform Act of 1990 in the United States showed that both processes have not resulted in quicker settlements or reduced expenses for litigants. See United States, Rand Institute for Civil Justice, *Report on the Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act of 1990* (1996) at 48.

[4] It is doubtful that the pursuit of efficiency in terms of cost and the reduction of the volumes of cases in courts, which is the goal of most court-connected mediation programs, can actually contribute to litigants' satisfaction. See Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR" (1991) 19 Fla. St. U. L. Rev. 1 at 7.

[5] What started as a theme of the Pound Conference of 1976 proved with the setting up of experimental mediation centres at New York, Dallas and Los Angeles that it could actually work in resolving variety of disputes.

[6] See Menkel-Meadow, *supra* note 4 at 6 - 9 which provides an overview of the evolution of ADR from the 1960s up until the 1980s.

[7] See *ibid.*

incorporating mediation into the judicial process of many jurisdictions in North America.[8]

In addition to these factors are the recommendations by the CBA Report which prompted a new wave of reforms in the procedural rules in Canadian jurisdictions. In order to tackle the problems of delay, cost and difficulty in understanding the justice system which litigants usually experienced, the Report recommended, among other things, that all Canadian courts should establish mechanisms for early intervention by designated and trained individuals in all cases, establish, monitor and enforce timelines in disposing cases and make use of non-binding dispute resolution processes in appropriate circumstances.[9]

The incorporation of mediation into judicial processes did not occur in one fell swoop. Many jurisdictions experimented with the use of mediation at the small claims court level and in situations where emotional issues featured more strongly than the legal issues, for example, disputes relating to child custody and access.[10] The nature of cases handled by the small claims courts and the proceedings which discourage representation by counsel made facilitative mediation relatively easy. Court personnel served as mediators when mediation was used in domestic cases and there were limits on the amount of time that could be spent in mediation. Sometimes the mediators were expected to make recommendations regarding access and custody if the parties fail to reach any agreement.[11]

---

[8] See Barbara McAdoo & Nancy Welsh, "Does ADR Really Have a Place on the Lawyer's Philosophical Map" (1997) 18 Hamline J. Pub. L. & Pol'y 376 at 382.

[9] The Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Ottawa: The Canadian Bar Association, 1996) recommendations 4 – 5 at 36.

[10] See for example, the description of the evolution of of mediation in Minnesota in Barbara McAdoo, "The Minnesota ADR Experience: Exploration to Institutionalization" (1991) 12 Hamline J. Pub. L. & Pol'y 65 at 74. The use of mediation at the small claims court was among the suggestions proposed for the ailing judicial system in the early years of ADR movement. See W. Burger "Isn't There a Better Way?" (1982) 68 A.B.A. J. 274 at 275.

Court-connected mediation commenced in Canada in 1972 with the pilot program known as the Edmonton Family Court Conciliation Project.[12] The pilot project was followed by the establishment of the first court-annexed mediation in the Family Division of the Provincial Court of Alberta, Edmonton, in 1975.[13] Building on the precedent set by Alberta in Family law, Saskatchewan became the first province to experiment with a general court-connected mediation program in 1994.[14] Different provinces followed the Alberta and Saskatchewan examples which eventually resulted in the annexation of mediation to the court systems in provinces across Canada. Although there are features common to virtually all the court-annexed programs, the nature, structures and operations of different court-annexed mediation programs are shaped by the background and peculiar circumstances, which necessitated their establishment in each province. Both their common and unique features are useful to consider in drawing comparisons and lessons for consideration in analysis of court-annexed program in Lagos State, Nigeria. For this reason, this chapter focuses on the description of the nature and highlights of sample court-annexed mediation programs across Canada. It also analyses the adaptations made to classic mediation by reason of its incorporation into the judicial process and the problems posed by court-annexed mediation to the legal system.

---

[11] See Craig McEwen et al, "Bring the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation" (1995) 79 Minn. L. Rev. 1317 at 1330 - 1350; See also Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L. J. 1545 at 1554 - 1555. Evaluative mediation which characterizes most court-connected mediation programs probably started at the level of the small claims court. This issue is analyzed in more detail in the later part of this chapter.

[12] Alberta Law Research Institute, *Court-connected Family Mediation Programs in Canada* (Research Paper No.20) (Edmonton: Alberta Law Reform Institute, 1994) at 60.

[13] *Ibid.*

[14] Michaela Keet & Teresa B. Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64 Sask. L. Rev. 57 at 57.

## B. Examples of Court-annexed Mediation

At the early stages of the introduction of mediation to the courts, the process was an alternative to adjudication which simply gave disputants the opportunity to enjoy the benefit of settling their dispute themselves without lawyers or judges imposing legal norms or standards.[15] Although the courts often appointed the neutral third party, his or her role was purely facilitative. However, as the scope and volume of cases resolved through mediation expanded, the nature of mediation started changing to reflect the role of mediation as an instrument of decongesting the courts' dockets and to deliver justice in an inexpensive manner.[16]

---

[15] Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to do With It" (2001) 79 Wash. Uni. L. Q. 787.

[16] Court-connected mediation transited from a process used in settling minor disputes in the small claims courts to a tool for resolving personal injury, contract and other civil non-family cases. See *ibid*. However studies suggest that mediation of complex civil law suits is at best more evaluative than facilitative or at worst more like mere negotiation sessions between attorneys with a third party, the mediator, in attendance. When it is different, it is something akin to judicial settlement conferences which exist in most jurisdictions: Deborah R. Hensler, "A Research Agenda: What We Need to Know About Court-Connected ADR" (1999) Disp. Resol.

As the court process is about lawyers and their trade, it is not surprising that lawyers at times dominate mediation sessions and reduce the process to monetary bargaining.[17] Disputants risk becoming onlookers in a process that was originally designed to empower them. In order to meet the expectations of court-annexed programs, mediators may also engage in assessing the respective strengths and weaknesses of disputants' cases, design easier and faster ways of reaching settlement, and intentionally or unintentionally pressure disputants into agreeing to a settlement option. Some commentators have argued that this transformation of mediation is the price for the legitimacy that the ADR philosophy has enjoyed in the legal system. This legitimacy is epitomized by the development of mediation across all jurisdictions and "its assimilation into the court system."[18] These features have not only kept mediation in the courthouse, but also distinguish court-annexed mediation from private mediation.

To understand the operations of mediation in different contexts and the adaptations made to classic forms of mediation in court-annexed processes, in this chapter I highlight different features of court-connected mediation programs. Examples are drawn from the Canadian provinces of Alberta, Saskatchewan, Ontario and British Columbia. This is followed by the adaptations classic mediation has undergone as part of the judicial process, the

---

Mag. 15 at 17; See also John Bickerman, "Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR" (1999) Disp. Res.Mag. 3 at 5.

[17] See *ibid.*

[18] Menkel-Meadow, *supra* note 4 at 2.

impact of mediation on litigation, and general problems associated with court-annexed mediation.

### 1. Alberta

As earlier stated, the first court-annexed mediation program was established in Family Division of the Provincial Court of Alberta in 1975. The focus of the program is to help parents resolve matrimonial issues such as access and spousal support. Services are free for parents of a child, if one of them has an annual income of less than $40,000.[19] The mediation process commences with separate meetings between the mediator and each of the parties. At the meetings, each parent has an opportunity to inform the mediator about the issues to be resolved. It is also an opportunity to determine whether mediation is the best alternative for the parties. A mediation session can only be slated if there is an agreement from both parties. Child Protection Mediation is also provided in courts at Edmonton, Calgary and rural Alberta.[20] Mediation is very vital in child protection disputes because it provides parents with the opportunity to give input into the decisions that are to affect their children.

In addition to mediation of family disputes, a one-year pilot project for the mediation of civil claims (other than family matters) in the Provincial Courts in

---

[19] Alberta Justice, "Court Services," online:<http://www.albertacourts.ab.ca/court services/mediation>.

[20] See Alberta Law Reform Institute, *Promoting Early Resolution of Disputes By Settlement* (Edmonton: Alberta Rules of Court Project, 2003) at 54.

Edmonton and Calgary was approved by Alberta Justice in 1995-1996.[21] The project, which provided for interest-based mediation to be conducted by trained and experienced mediators, was a joint venture between Alberta Justice and some community-based organisations.[22] Parties who wished to have their cases mediated could request a mediation appointment at the time of filing their claims or dispute notes. When such intention was not evinced by the parties, the court could also schedule the case for mediation.[23] The settlement success rate of this project eventually led to the creation of the current Provincial Court Civil Mediation Program.

Resolving disputes in a timely fashion is one of the key objectives of the current mediation program and to facilitate that all parties on whom notices are served must attend a mediation.[24] If any of the parties is a corporation, it must be represented by a natural person who has both the knowledge of the facts of the case and the authority to resolve the action on behalf of the corporation.[25] However, a party may, ask for an exemption from mediation. The application for exemption from mediation and can only be granted if the court considers the applicant's reason "good and sufficient" enough to warrant exemption from mediation.[26]

---

[21] Alberta Justice, *Annual Report 1995-1996* (Edmonton: Alberta Justice, 1996) at 16.

[22] *Ibid.* See also Alberta Justice, *Annual Report 2001-2002* (Edmonton: Alberta Justice, 2002) at 31. The project commenced in Edmonton in January 1998 and was later extended to Calgary in September of the same year.

[23] Alberta, *Provincial Court Mediation Rules*, r.2.1 & 2.

[24] *Ibid*, r.5.1.

[25] *Ibid*, r.5.2.This provision is very important in view of the levels of authority that exist in modern businesses and other organisations. As earlier pointed out in chapter two the intended advantages of mediation may fritter away if a corporation or any organisation is allowed to send any representative notwithstanding whether the person being sent has the power to settle the dispute on behalf of the organisation.

The Provincial Court Civil Claims Mediation Program is highly integrated into the litigation process of the court. A single session is mandatory in all cases for which it has been selected by the court or for which a Dispute Note has been filed by any of the parties.[27] In such cases, parties must give notice of completion of mediation to the court before their case will be fixed for trial.[28] Non-attendance by any of the parties will not necessarily prevent the case from being fixed for trial, but may attract sanctions from the court.[29] Although mediation is a step in the court procedure, the process itself is protected from the pervasive effect of the adversarial process. For example, in order to promote frank and good faith discussions among parties, communications made at mediation sessions are made inadmissible in other court proceedings and such communications are to be kept confidential, if parties so agree.[30]

---

[26] *Ibid,* r.11.There is no provision in the rules for the grounds that should constitute good and sufficient reason for the purposes of exempting parties from mediation. It is entirely within the discretionary powers of the court to determine whether or not applications for exemption should be granted.

[27] Unless one of the parties requests that a particular case be scheduled for mediation, scheduling cases for mediation is entirely within the discretion of the court. But once cases are scheduled, attendance of the parties becomes mandatory, except where there is an exemption as provided in the rules. See Alberta, *supra* note 22, r.2.1 & 2 and r.11.

[28] *Ibid* r.12. Completion, under the rules, does not mean that the parties must have resolved their dispute successfully through mediation. It is broadly defined to include termination of any mediation process by any of the parties or the mediator for any reason, which the mediator considers valid enough to warrant termination. *Ibid.*r.13.

[29] *Ibid,* r.14 reinforces the court's authority to ensure attendance as required by the rules and the court may order an another mediation session in respect of the same case, compelling the erring party to attend; strike out his or her pleadings except when it is inequitable to do so or there is a good reason for non-attendance, award costs in a manner it may consider appropriate or make other orders it deems fit in respect of the case.

Mediation has also been incorporated into the litigation process at the Court of Queen's Bench. There is currently a two-year pilot program in the judicial districts of Edmonton and Lethbridge/Macleod which applies to all civil non-family lawsuits filed on or after September 1, 2004.[31] Unlike the program at the Provincial Court, parties pay for the services of mediators that they use. The process can commence either by a Request to Mediate filed by the parties after filing and serving their Affidavit of Records or at the instance of the court. However, a request to mediate cannot be served after a certificate of Readiness has been filed.[32] Commencing mediation after a note of records helps ensure parties have factual information necessary to identify both opposing and common interests and assess if mediation might be helpful. Filing a request to mediate or selecting a case for mediation under the program does not stall or suspend proceedings in the matter and case management orders can still be made irrespective of the progress being made on the case through mediation.[33]

---

[30] *Ibid*, r.6 & r.8.

[31] Alberta, *Court of Queen's Bench Practice Note 11*, r.1. There is also the Judicial Dispute Resolution ("JDR") which is available to litigants in Calgary and Edmonton. JDR differs from classic mediation because the mediators are usually serving judges of the court.

[32] *Supra* note 17, r.3. Affidavit of Records refers to the affidavit made by a party to a proceeding to disclose relevant and material records. It specifies, among other things, which of those records are in the possession of the party making the affidavit and which of those the party is objecting to, if any, and the grounds for such objection: Alberta, *Rules of Court*, r.187. A certificate of readiness, on the other hand, is a form filed by any of the parties to a dispute to have a matter set down for hearing after parties have completed their pleadings, discoveries, admissions, undertakings and have also concluded all interlocutory proceedings: r.236 (1).

The civil mediation program is not mandatory for all civil cases coming before Court of Queen's Bench. However, it is the responsibility of the party who does not want to have the case mediated to apply for an exemption. Unless there is an objection from one or more of the parties to the dispute, the matter will be slated for mediation once a request to mediate has been made by one of the parties.[34] Mediation is conducted by a mediator agreed upon by the parties or appointed by the Mediation Co-ordinator for the Judicial District, from a roster, if parties are unable to agree on any mediator within 30 days of service of the request to mediate.[35]

### 2. Saskatchewan

The prelude for the introduction of court-annexed mediation in Saskatchewan was the creation, in 1988, of the Mediation Services Branch within the Department of Justice and legislative intervention in the relationship between lenders and farmers in Saskatchewan.[36] In order to reduce problems associated with foreclosure of farms, the *Saskatchewan Farm Security Act* introduced mandatory mediation in every legal action for foreclosure of farmland in the province.[37] This was followed by the extension of mediation to non-family civil litigation at the Court of Queen's Bench in 1994.[38] There is a three hour free-of-charge mediation session in every non-family civil litigation, however, parties may extend the time by agreement but the cost of the extension is born by the parties.[39] The program commenced initially as a pilot project in 1994 in two judicial centres but has been extended and is now available in five judicial centers, applying to about 80% of non-family civil litigation cases in the province.[40]

---

[33] *Practice Note, supra* note 31, r.11. Despite the fact that mediation might be ongoing, it is still possible for the case management judge to order, among other things, that steps be taken by the parties to identify or clarify the issues in the action; establish a case timetable and order the parties to conform to it or even make direction to facilitate any interlocutory application, discovery or other pre-trial step: Alberta, *Court of Queen's Bench Practice Note* 1, r.14.

[34] *Practice Note ibid.* r.4, 9 & 10.

[35] *Ibid.* r.5.

[36] The legislative intervention was the enactment of *the Saskatchewan Farm Security Ac*t, S.S. 1988-89, c. S-17.1. The purpose was to regulate the relationship between lender-institutions and

The court initiates the mediation process by forwarding the case file at the close of pleadings to the Saskatchewan Justice Dispute Resolution Office.[41] The co-ordinator of the civil mediation programs follows up by a letter to the parties

---

individuals alike, execution creditors and the owners of farmland who might have defaulted in meeting their financial obligations to the lenders.

[37] *Ibid*.s.15

[38] See Michalela Keet & Teresa B. Salamone, *supra* note 13 at 61. Some types of non-family actions are exempted. For example, an appeal from Provincial Court or other statutorily authorized commission, tribunal or body, an application for judicial review, an action under the *Bankruptcy and Insolvency Act* and an application for interlocutory relief would not be subject to mandatory mediation. *The Queen's Bench Regulation, R.R.S.* 1999 c. 1-1.01, O.C 433/99, s.5 (2).

[39] Keet & Salamone, *ibid* at 61.

[40] See C.F. C. J: *News and Views on Civil Justice Reform* (2002) Issue 4 at 15.

[41] *The Queen Bench Regulation, supra* note 37, s.2 (1), See also *The Queen's Bench Act*, 1998, S.S 1998, c.Q-1.01, s.42 (1). The phrase "close of pleadings" is explained by the regulations to mean

a) For an action or matter commenced by statement of claim, when a statement a statement of defence is filed or, where a counterclaim, cross-claim or third party claim is filed, when a defence to counterclaim, defence to cross-claim or third party defence is filed;
b) For an action or matter commenced by petition, when that document is filed; and
c) For an action or matter commenced by notice of motion or originating notice, the return date of the notice if a final order is not granted on that return date; s.2(3).

asking for a mutually agreeable date within the next three weeks, for the mediation session.[42] A mediator is usually appointed by the co-ordinator from full-time mediators within the justice department or from contract mediators.[43] Parties are expected to meet with the mediator individually before the mediator and the parties convene as a group. At the end of the exercise, the mediator files a Certificate of Completion with the Court of Queen's Bench.[44] Completion of mediation sessions is mandatory before any further action is taken.[45] Where one of the parties fails to attend, the other party may request a Certificate of Non-Attendance.[46] The court may sanction the unwilling party by either compelling attendance or making an order regarding a new mediation session with specific terms and may in some circumstances strike out his or her pleadings.[47]

In the area of family law, mediation services were also provided in the past by the Mediation Services Branch of the Saskatchewan Department of Justice as part of the comprehensive mediation program of the province.[48] However, in 1990 family mediation became a distinct component of mediation services provided by Justice Department.[49] Unlike other civil cases, family mediation is commenced at the request of the parties. The court, may appoint a person to mediate custody, access or disputes relating to maintenance.[50] Services of the mediators are available on a fee-for-service basis. However, the proportion of the mediator's fee to be paid by each party is as determined by the court.[51] The court may also order that one party pays the entire cost, if it is satisfied that payment would cause the other party serious financial hardship.[52] In the event that parties are unable to resolve the dispute, either of them can, after the first mediation, discontinue with the process and proceed along the litigation path.[53]

---

[42] *Saskatchewan Civil Mediation Program*, online:<http://w.w.w.sakjustice.gov.ca>
[43] *Ibid.*
[44] *The Queen's Bench Act, 1998, supra* note 28, s.42(4).
[45] *Ibid.*, s.42 (1).
[46] *Ibid.*, s.42 (3).
[47] *Ibid.*, s.42 (5).
[48] See Saskatchewan *supra* note 41.
[49] The Mediation Services Branch of the department of Justice was originally created to provide mediation services to parties that would need them as required under The Saskatchewan Farm Security Act, 1988, but as a result of the extension of mediation services to other areas of the law, the branch commenced delivering mediation services in the area of family law in 1990: Canadian Forum on Civil Justice, *supra* note 39.

### 3. Ontario

The mandatory mediation program in Ontario's superior courts commenced on January 4, 1999 on the heels of pilot projects established in Toronto in 1995 and Ottawa in 1997.[54] Civil [non-family] actions that are subject to case-management as well as contested estate matters are referred to a mandatory three-hour mediation session.[55] Mediation must take place within ninety days of the filing of the first defence, although there is an opportunity to extend the time.[56] Mediators are agreed upon by parties from a pre-approved roster or are appointed by the mediation co-ordinator from a pre-approved roster for the county, or from among mediators who are not on the roster, if the parties agree.[57] In order to facilitate the smooth operation of the program, the rules provide for the appointment of masters in each jurisdiction to hear applications pertaining to adjournment or exemption from mediation and to administer the case management program, which is a vital element in the mandatory mediation program.[58]

---

[50] *Children's Law Act*, S.S 1990, c.C- 8.1, s.10; *Family Maintenance Act* S.S. 1990, c.F-6.1, s.13. Although the two statutes were repealed by the *Children's Law Act and Family Maintenance Act of 1997*, the provisions in respect of mediation of disputes were retained. See *The Children's Law Act*, S.S 1997, c. C-8.2, s.10(1) & *Family Maintenance Act*, S.S 1997, c.F-6.2, s.15(4)

[51] *The Children's Law Act*, *ibid*, s.10 (4); *Family Maintenance Act*, *ibid*, s.15 (4).

[52] *Ibid.*, s.10 (5) and s.15 (5) respectively.

[53] *Ibid.*, s.10(6) and s.15(6).

[54] *Mandatory Mediation, Ontario* online :<http://www.mediate.ca/ontariommp.htm.>.

[55] Ontario, *Rules of Civil Procedure* (Court of Appeal and Superior Court of Justice), r.24.1.01, and r.75.1.01. Case management is a system in which the court supervises cases and imposes strict timelines on their movement through the pre-trial and trial process. To qualify as a case-managed action, the matter must have either commenced in one of the counties mentioned in the schedule to the rule on or after the date specified for the county and assigned for case management by the Registrar acting under the direction of the Regional Senior Judge or commenced in the city of

The Ontario mandatory program is highly integrated into the litigation process and has more detailed procedures than programs in other provinces. As part of the preparation for mediation, parties are required to prepare, from their perspective, a Statement of Issues which identifies the issues in dispute positions,

---

Toronto on or after July 3, 2001 and assigned to case management by the Registrar acting under the direction of Regional Senior Judge: r.77.01 (1).

[56] *Ibid.*, r.24.1.01.9 (1). Extension can only be as ordered by the court. See r.24.1.01.9 (2) (a) – (d) for factors that should be considered by court before an extension is made.

[57] *Ibid.*, r.24.1.08(2).The mediation co-ordinator can only appoint a mediator for a case if parties are unable to on agree mediator within 30 days after the first defence is filed: r.24.1.09(5) & (7).

[58] *Ibid.*,r.77.04(10).The case management master is conferred with the case management powers and duties which include the power to hear motion in a proceeding and to exercise other powers of a judge in respect of a motion, except in the following circumstances:

(i)where the motion is such that the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

(ii) the motion is to set aside, vary or amend an order of a judge;

(iii) the motion seeks to abridge or extend a time prescribed by an order which a case management master could not have made;

(iv) where the motion is for judgment on consent in favour of or against a party under disability;

(v) where the motion relates to the liberty of the subject;

(vi) the motion is brought under section 4 or 5 of the *Judicial Review Procedure Act;* or

(vii) the motion is brought in an appeal: r.37.02(2) (a) – (g).

and interests.[59] Pleadings and other important documents that the party wishes to rely on must be attached to the Statement of Issues and all of those are to be made available to the mediator and other parties to the dispute at least seven days prior to the mediation.[60] This enables parties to think about what matters to them in advance, helps the mediator identify common interests and possible options for mutual gain, and ideally makes the three-hour mediation more productive. If a party fails to file the processes, or fails to appear at the mediation as scheduled, the mediator may file a Certificate of Non-Compliance.[61] When a Certificate of Non-Compliance is filed, the case is referred to a case management master or a case management judge, who may convene a case conference and do any of the following: (1) establish a timetable for the action or strike out any document filed by the defaulting party (2) depending on the party that is at fault, dismiss the action, or strike out the defence or (3) order a party to pay costs or make any other just order.[62] The rules also expressly provide that a party must attend mediation with his or her lawyer if he or she is represented and that those attending the mediation session must have authority to settle the case or at least have telephone access to a person from whom directions can be taken.[63]

---

[59] *Ibid.*, r.24.1.10(1) &(2).

[60] *Ibid.*, r.24.1.10(1)&(3).

[61] *Ibid.*, r.24.1.12.

[62] *Ibid.*

[63] *Ibid.*r.24.1.11 (1) & (3). As discussed in chapter two, the issue of lack of authority to settle can deprive mediation of its key features – cost-effectiveness and timeliness. Imposing an obligation on the parties to confer authority on whoever that is attending on its behalf is a way of reinforcing the seriousness and integrity of the process.

Under the second arm of the Ontario Mandatory Mediation Program, (estates, trusts and substitute decision cases) matters are referred to mediation by an order of court on a motion for directions filed by any disputant who wants to have a dispute mediated.[64] When the motion is brought, the court may give directions regarding issues to be mediated; the party who has carriage of the mediation; the time frame for conducting mediation; the parties designated to attend the mediation, how these parties are to be notified of the mediation, and how the cost of mediation is to be shared among the parties.[65] Those required by the court to attend mediation may or may not select a mediator from the program's roster and once the mediator is selected, the party with the carriage of mediation must give the mediator a copy of the order giving instructions.[66] Where the designated parties fail to select a mediator within 30 days of the court order giving instructions, the party with carriage of the mediation must file with the local mediation co-ordinator a request to assign a mediator together with a copy of the order giving instructions.[67] The local mediation co-ordinator will then assign a mediator from the roster.

---

[64] Ontario, *Rules of Civil Procedure, supra* note 54, r.75.1.02 (1); r.75.1.05 (4) & r.75.1.05 (1) & (2). The motion must be brought within 30 days after the last day for serving a notice of appearance and may also be combined with a motion for directions brought under r.75.06 (1). That is to say, any person who appears to have a financial interest in an estate may bring it.

[65] *Ibid.*, (4).

[66] *Ibid.*, r.24.1, r.75.1.06(1) & r.75.1.07(2).

[67] *Ibid.*, (3) & (4). If the party with the carriage of mediation is unable to file the request, any of the designated parties may also file it. In any event, the mediator whether assigned or selected, must immediately after his or her appointment, fix a date for the mediation and at least 20 days before that date, serve on every designated party a notice of the place, date and time of the mediation: (7).

Although the cost of mediation is covered by the parties, the fees are set by government to cover one-half hour of preparation by the mediator for each party and a mediation session of up to three hours.[68] Parties share the cost equally, but the court may make an order for a different sharing formula.[69] Individuals who have a legal aid certificate or meet financial eligibility requirements of the Ministry of Attorney General may participate in mediation free of charge.[70] If the case settles at the mediation session, the agreement resolving some or all of the issues in dispute must be in writing, and signed by either of the parties or their lawyers. The defendant must file a notice advising the court of the settlement within 10 days of the agreement being signed or within 10 days of the necessary conditions being fulfilled, in the case of conditional agreements.[71] Parties are expected to carry out the terms of the settlement agreement to the letter. If a party fails to comply the other party may apply to the court for judgment under the terms of the agreement or continue the legal proceedings as if there had not been any agreement at all.[72]

The "one cap size fits all" nature of the Ontario case management system which has mandatory mediation as one of its components created problems for the Toronto civil justice system. Rather than help to reduce the disposition time for cases, the case management system brought about delay in Toronto courts. Some case-managed matters which were commenced in 2004 were scheduled for trials between 2006 and 2008.[73] To make the system function more efficiently in the Toronto region, the mandatory time frames have been extended in order to provide lawyers with sufficient time to conduct discoveries, exchange documents and obtain the necessary information and materials that might be useful to them during mediation. Although still mandatory, mediations are to be conducted at the any stage in the proceeding at which it is likely to be effective but no later than 90 days after the action is set down for trial by any party.[74]

---

[68] O. Reg.451/98, s.4. Depending on the number of parties, the maximum fees to be paid are as follows: $600, where there are only two parties; $675 in case of three parties while four parties and five parties & above attract the sums of $700 and $825 respectively: s.4(1). The scale does not apply to the fees to be agreed between the parties and the mediator in respect of mediation sessions held after the first three hours: s.4(3).

[69] See e.g. Ontario, *supra* note 54, r.75.1.

[70] *O.* Reg., *supra* note 67, s.7 (1) & (2).

[71] *Supra* note 42, r.24.1.15 (3) & (4). The mediator is also required to give his or her report to the mediation co-coordinator and the parties within 10 days of concluding mediation: r.24.1.15 (1).

[72] *Ibid.*, sub rule (5). See also O. Reg. 453/98, s.1; O. Reg. 288/99, s.14.

### 4. British Columbia

British Columbia operates a "party driven" court-connected mediation program.[75] Unlike some programs in other jurisdictions where the courts mandate mediation, any party to a civil action, initiate mediation by filing a Notice to Mediate with the other parties and with the dispute resolution office in the Ministry of the Attorney General.[76] The use of Notices to Mediate started with motor vehicle actions in 1998 and owing to the results achieved with its use, was extended to the residential construction industry in May, 1999 in an attempt to solve the problems associated with the use of adversarial process in complex residential construction issues.[77] The Notice to Mediate program was eventually extended to civil (non-family) litigation in the Supreme Court of British Columbia on February 15, 2001.[78] The Queen's Bench Mediation pilot program of Alberta is modelled on this system.

---

[73] Justice Warren K. Winkler, "New Civil Case Management Pilot for Toronto Region: Rule 78 Cases" (Paper presented to the Into the Future : The Agenda for Civil Justice Reform Conference held in Montreal on April 30 – May 2, 2006) 1 [unpublished].

[74] *Ibid.* at 5. The new Rule 78 which brought about changes in the case management system in Toronto courts came into effect on May 1, 2005. It is still contemplated that in some cases such as wrongful dismissal disputes, mediation would occur within 150 days of the close of pleadings.

[75] The "party driven" program was preceded by the use of mandatory settlement conferences at the Small Claims court. The conferences were presided over judges who could use different kinds of strategies including interest-based negotiations to help parties resolve their dispute without the use of adjudication. See E. D Schmidt, "B.C Small Claims – Has it Worked ?" 93 Advocate 1 at 2.

The Notice may be issued at any time between 60 days after the filing of the first statement of defence and 120 days before the date of trial or even outside the time frame, that is, either before or after the period prescribed in the rules, if the court orders that it be used. [79] All parties must agree on a mediator within 14 days after Notice is served in cases where are there are four or fewer parties or within 21 days, if there are five. [80] Any party may apply to the roster organization to appoint a mediator, if the parties are unable to agree on a choice of a mediator within 14 or 21 days [whichever that is applicable] and on the strength of such application, a mediator may be appointed as prescribed by regulation.[81]

---

[76] *Notice to Mediate (General) Regulation,* B. C. Reg.4/2001, s.3.

[77] It is reported, in an evaluation prepared in June, 1999, that between 1998, when it was introduced and May, 1999, it was used in more than 11,000 motor vehicle actions and that in approximately 74 per cent of the actions mediated under the Notice, all issues were resolved. Additional 10 per cent of actions settled after delivery of a Notice but before the mediation session: Dispute Resolution Office, "Information Bulletin: Notice to Mediate (General) Regulation" (June, 2002) online: Dispute Resolution Office Bulletin<http://www.ag.gov.bc.ca>. See also B.C.Reg.152/99.The prelude to its extension to the residential construction industry, was the Report of the Commission of Enquiry into the quality of Condominium Construction in British Columbia: The Renewal of Trust in Residential Construction, otherwise called, the Barrett Report, which observed that the traditional adversarial process has not worked well in practice and therefore recommended that the then proposed *Homeowner Protection Act* make available an alternative dispute resolution option for disputes arising from problems surrounding residential construction.

[78] *Notice to Mediate, supra* note 72: The extension was made after a wide consultation with the members of the Bar and the Bench as well as the mediation community. See Dispute Resolution Office Bulletin, *ibid.* Exceptions to the application of the regulation are allowed in limited circumstances, for example s.2 provides that the regulation will not apply to (a) actions brought under the *Judicial Review Procedure Act,* R.S.B.C, 1996, c. 241. (b) claims for compensation for physical and sexual abuse (c) Matters to which *Education Mediation Regulation* (B.C.Reg. 250/2000) and other Notice to Mediate Regulations, that is, B. C. Reg. 127/98 & B. C. Reg. 152/99 apply. Parties may also be exempted if they had previously attempted to mediate the same dispute without success. See s.4.

Where the appointment is made by the roster organization, parties are still allowed to give input. The roster organization delivers to all parties an identical list of at least six possible mediators within seven days of receiving an application and then each party has seven days to remove up to two names and number the remaining names in order of preference. Alternatively or he or she may return the list with no changes. A party may be deemed to accept all the names without objection if he or she fails to return the list within seven days of receiving it. When all the lists are returned, the roster organization has another seven days to appoint the mediator, taking into account the preferences shown by the parties, the need for the mediator to be appointed to be impartial, qualifications, fees, nature of the dispute as well and the availability of the mediators.[82] The roster organization usually appoints mediators from the roster but non-roster mediators may be appointed in a situation where all the names in the list sent to the parties have been deleted by them. [83] Once appointed, the mediator assesses if a pre-mediation conference is required.[84] It is mandatory for all parties to attend the conference if notice is served on them.[85]

---

[79] *Ibid.,* s.5 & s.23.

[80] *Ibid.,* s.6. Party is defined to include an insurer of the party to the action. *Ibid.,* s.1.

[81] *Ibid.,* s.7.The regulation defines a roster organization as any body selected by the Attorney General to appoint mediators for the purpose of the regulation *Ibid.,* s.1. The British Columbia Mediator Roster Society is designated as the roster organization for purposes of the program.

Mediation services are also available at the Small Claims Court for actions of $10,000 or less and actions of above $10,000, but less than $25,000.[86] In respect of actions of less than $10,000, mediation is available if it is a disputed claim whether for debt or other than debt relating to the construction, improvement or renovation of a building if the dispute is referred to mediation by a judge at a settlement conference with consent of the parties or if a party files a Notice to Mediate.[87] For actions with monetary value of $10,000 to $25,000 one of the parties can, after a reply has been filed, in a manner similar to the procedure at the Supreme Court, compel the other parties to attend mediation by filing a

---

[82] *Ibid.,* s.8.

[83] *Ibid.*

[84] *Ibid.,* s.12 .Pre-mediation conference is a meeting at which such matters as pre-mediation exchange of information, obtaining and exchanging expert reports and scheduling of mediation proper are discussed. See *ibid.*, s.13.

[85] *Ibid.*, ss.14 & 15 A party may be exempted from attending the pre-mediation conference if he or she agrees with other participants that there is no need for he or she to attend. To be effective, the agreement to exempt such party must be confirmed by the mediator in writing: s.22 (b); Also, one may obtain exemption, if on his or her application to court, the judge is of the opinion that it is materially impracticable or unfair to require the party to attend: s.23(c)

[86] British Columbia, *Small Claims Rules*, r.7.2 & r.7.3.

[87] *Ibid.*, r.7.2(2); See also B. C. Reg. 250/2005, s.1 Mediation services at this level are provided by the B. C. Dispute Resolution Practicum Society, to provide experience to newly trained mediators.

Notice to Mediate form.[88] The parties are to mutually agree on the choice of the mediator. However, a party cannot initiate mediation if the proceeding involves a party that has either obtained a restraining order or a peace bond or the claimant, defendant and cause of action in the proceeding are the same as the plaintiff, defendant and cause of action in another matter brought in the Supreme Court.[89]

### C. Adaptations of Classic Form of Mediation in Court-Annexed Programs

Adaptations, in this context, refer to the modifications in court-annexed mediation which are designed to "make bargaining more efficient and settlement more likely."[90] Welsh explains the necessity for adaptation thus

> [W]henever an institution adopts an innovation, the institution nonetheless remains (and perhaps must remain) true to its own defining norms. Context does matter. In remaining loyal to its own norms, an institution may consciously or unconsciously disregard the norms of those that created the innovation and brought it to the attention of the institution.[91]

Some of the more significant adaptations which mediation has undergone in the court-annexed process are discussed below. Although some of the points raised are debated among ADR practitioners and experts, they underscore some of the more fundamental challenges of incorporating classic mediation principles and procedures into judicial process.

---

[88] *Small Claims Rules, supra* note 82, r.7.3 (5) & (6); See also B. C. Reg.251/2005, s.3.

[89] *Ibid.*, r.7.3(3).

[90] Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to do With It?" (2001) 79 Wash. U. L. Q. 787 at 805.

[91] *Ibid.* at 804.

### 1. Loss of Party Control and Self-determination Principle

As elaborated in Chapter One of this thesis, mediation in its classic form is a "disputant-centered" and "disputant-dominated" procedure anchored on the active and direct participation of parties both in negotiations and determination of the outcome.[92] In contrast to the feelings of marginalization and alienation which usually occur as a result of litigants' ignorance of the law and its processes, participation in the resolution of their own disputes is supposed to give parties a sense of control over their affairs.[93] Parties set the ground rules guiding the process and they are not constrained by legal norms in the course of their negotiations.[94] The self-determination principle and party control inherent in mediation empower the parties in a way that would not have been contemplated within the court system.

---

[92] Jay Folberg, "A Mediation Overview: History and Dimensions" (1983) 1 Med. Q. 3 at 8. Unlike the litigants in adjudication, the disputants "involved in mediation are not simply recipients of a service; they are actively involved in the process as participants." Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation* (San Francisco: Jossey-Bass, 1984) at xiii.

[93] See Nancy Rogers & Craig McEwen, *Mediation: Law, Policy and Practice* (New York: West Publishing, 1997) at 5. Understanding and participation in a process are so important to litigants that the fairness of a dispute resolution procedure is often adjudged by the degree of openness and involvement it allows the disputants. For example, a study showed that because lay litigants were unable to participate in their lawyers' negotiations and judicial conferences, they considered both processes to be less procedurally fair than arbitration or even trial despite the adversarial nature of the two processes: Frank E. Sander et al., "Judicial Mis(use) of ADR?: A Debate" (1996) 27 U. Tol. L. Rev. 885 at 893.

[94] The mediators practically control the process because they usually set the ground rules which they explain to the participating parties. However parties are at liberty to change the rules and indeed tailor their settlement to their personal values and norms because the process does not

The assimilation of mediation into the judicial process and its application to a wide range of civil, non-family disputes may erode party control and the self-determination principle. This is because despite the intention of mediators engaged in the process, the primary reason for court-annexed mediation from the judicial process perspective is to facilitate quicker and cheaper settlement of disputes. Thus, settlement mediation in most civil disputes in the court system is characterized by monetary bargaining.[95] The belief that negotiations are likely to be more positive and therefore produce quick resolution of disputes if the process is streamlined to include those with the knowledge and authority to settle the dispute, informs decisions about who should attend.[96] This and notions about the right to legal representation, also inform procedures such as mandatory presence of lawyers if lawyers have been retained, or at least the option for them to participate.

Lawyers who represent their clients in courts are usually given the authority to settle disputes on behalf of those clients, thereby making the

---

operate under any kind of legal precedent: Folberg & Taylor, supra note 88 at 8. See also Kimberley K. Kovach & Lela P. Love, "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 Harv. Negot. L. Rev. 71 at 89.

[95] Welsh, *supra* note 90 at 790.

[96] See Leonard L. Riskin, "Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29 at 43-45.This explains why most court-connected mediation rules expressly require that participants must either have authority to settle the dispute or have direct access to the person with such authority.

presence of disputants in court of academic relevance only. In cases involving accident or personal injury, the presence of the person or establishment that controls the funds to be used for settlement is often more important than that of the actual parties.[97] Where the disputants do not give their lawyers the authority to settle the dispute without them the influence of the lawyers is still significant. This is because the lawyers are professionals versed in the requisite skills necessary to operate in the legal environment. While the disputants' perceptions might be influenced by socio-psychological factors which are likely to hinder the settlement process, the lawyer is likely to bring his or her expertise to bear by using what is, or appears to be, a more informed approach to determine whether to settle and what the terms of the settlement should be.[98] Therefore, there is still the tendency for litigants to depend on their lawyers for bargaining. [99]

The dominant role assumed by lawyers in court-connected mediation, whether intentional or not, is consistent with settlement discussions between lawyers held in respect of cases that are pending in court. Such discussions balance a variety of factors including legal rights and costs of trial. Just like independent settlement discussions, court-connected mediation tailored toward settlement rather than solutions of mutual gain crafted on underlying needs and interests, may not achieve "a sense of just treatment for the disputant."[100] Settlement might not be as easy to achieve so quickly where the control of the process is left in the hands of the disputants themselves who might not fully understand the bargaining paradigm of the court system, focus on legal rights and costs or share the concerns of policymakers and mediators.

---

[97] The nature of life in contemporary times makes it imperative that insurance companies must be involved in cases covered by their policies. The presence of insurance companies in those cases is more relevant than those of the actual parties.

[98] Studies have shown that lawyers tend to focus more on whether a settlement or a trial is likely to yield a better financial result and are therefore less likely to be influenced by the framing of a settlement offer than lay disputants: Russell Korobkin & Chris Guthrie, "Psychology, Economics and Settlement: A New Look at the Role of the Lawyer" (1997) 76 Tex. L. Rev. 95-112.

[99] Most lay litigants lack the necessary skill to navigate through the court processes and would readily yield the power to negotiate and settle disputes to their lawyers once the dispute enters the court arena. It is not uncommon for clients to absent themselves from the mediation settlement negotiation and other sessions. When they attend, they might still not be involved in the process since the talking is often done by the lawyers: See Elizabeth Ellen Gordon, "Attorneys' Negotiation Strategies in Mediation: Business as Usual ?" (2000) 2 Med.Q. 371 at 383.

Lawyers may also feel uncomfortable with their clients assuming a dominant role and view this as contrary to the client's interest. Whether consciously or unconsciously, to some lawyers it might be necessary to maintain the mystique of professional expertise and this he or she can effectively do when the mediation process or any other step in the matter is controlled by him or her and not by the client. Mediators, who, like judges, are aware of the pattern of the settlement negotiations in the court contexts, are less likely to interfere in the lawyer-client relations, even though mediation is for the disputants and not their lawyers. The common concern to make deals if the terms appear favourable can bring about a kind of professional conspiracy to reduce the role of disputants in mediation in order to increase the possibility of achieving settlement.[101]

---

[100] Welsh, *supra* note 90 at 4.
[101] See Riskin *supra* note 92.

## 2. Evaluative Intervention of Mediators

As pointed out earlier, the mediator's role in classic mediation is restricted to facilitating negotiations between the parties. Evaluative assessments are discouraged because such opinions may strengthen the position of one party and weaken that of the other thereby converting mediation into a "a tug of war" where tension and distrust is fuelled by the mediator's compromised neutrality.[102] However, the mediator in court-connected mediation can be caught up in the clash of rights and claims between parties who have already designed strategies and schemes for achieving victory in the court. Although most court-connected mediation programs provide for interest-based negotiations, in practice it is very difficult to encourage parties to pursue their interests in mediation after they have expended time and resources exploring their rights and building up their claims. Mediation in such circumstances is either consciously or unconsciously perceived by some parties as another step in the litigation track and lawyers as well as their clients may use it to assess the strengths and weaknesses of their respective claims.[103]

---

[102] Yaroslav Sochynsky, "Mediation – A Guide for Practitioners" California ADR Practice Guide, Reprinted in Katherine V.W Stone, Private Justice: The Law of Alternative Dispute Resolution (New York: Foundation Press, 2000) at 42.

[103] The distinction between mediation and other case-management tools available in the legal system is often lost on lawyers and disputants probably because they are either mandated by the rules of court to take their matter to mediation or they are referred to mediation by the court itself.

In their search for informed and reliable opinions, most lawyers and even disputants prefer mediators with some degree of knowledge and experience of the legal issues involved in the case.[104] Thus when given the option to select a mediator, rather than having one selected by the court or other designated body, lawyers may seek a mediator with some substantive expertise and who is willing to intervene and guide settlement discussions. Some mediators play along with counsel in this way, apparently, because of the similarity of goals and objectives of both parties to reach settlement.[105] Underlying interests of the disputants which ought to be recognized in a classic mediation may be disregarded, if the mediator does not also have sufficient time and skill to ensure that all relevant interests are drawn out.

Evaluative mediation thrives in court-connected programs for a number of other reasons. First, lawyers prefer mediators "who will use and apply the norms and language of the legal" environment to educate their clients on realistic expectations in the event that the matter goes on to trial. Second, an evaluative assessment of the case when made by an impartial third party serves as a double check for both lawyers and disputants who might have developed their strategies and tactics on how to pursue the matter. The mediator's opinion reassures the lawyer and his or her client about genuineness of their claims when such opinion agrees with their assertions and becomes a guidepost for the re-examination of their position when it is not in tandem with their expectations.[106] Thirdly, evaluative interventions are used in mediation sessions to apply subtle pressure on parties in cases where settlement would otherwise be difficult to reach.[107]

---

[104] In the US, a study showed that 84.2% of lawyers surveyed believed that the most important qualification for mediators is "substantive experience in the field of law related to the case": Bobbi McAdoo, "A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota" (2002) 25 Hamline L. Rev. at 38. The results of another study showed that most attorneys would rather have mediators who are experienced trial lawyers mediate their cases: James J. Alfini, "Trashing, Bashing and Hashing It Out: Is this the End of "Good Mediation"?" (1991) 19 Fla. St. U. L. Rev 47 at 66-71 Yet in another study using medical malpractice cases, almost 70% of attorneys surveyed want mediators to provide opinions on the merits of medical malpractice cases and most of the attorneys placed high premium on mediators who possessed substantive knowledge in medical malpractice: Thomas B. Metzloff et al., "Empirical Perspectives on Mediation and Malpractice" (1997) 60 L & Contem. Probs. 107 at 144-145.

[105] The result of a survey of Hennepin County lawyers showed that the majority perceive mediators to frequently or always predict outcomes about one-third of the time and propose realistic settlement ranges about two-thirds of the time: Barbara McAdoo & Nancy Welsh, "Does ADR Really Have A Place on the Lawyers' Philosophical Map?" (1997) 18 Hamline J. Pub. L. Pol'y 376.

Although adapting the role of the mediator to suit the purpose of court-connected programs might work efficiently as expected by program designers, there are still great concerns about the use of evaluative intervention in court-connected mediation. First, the idea of a meddlesome mediator runs contrary to the self-determination principle of classic mediation. In fact, it is akin to the traditional methods of professionals such as lawyers telling their "clients what they ought to do and thereby disempowering the clients" in a process that is absolutely theirs.[108] Litigation is often guided by procedural safeguards which constrain the actions of the evaluative arbiter. The mediation process does not contain such standards and safeguards and there is a possibility of supposed objective opinion being tainted by the evaluative mediator's idiosyncrasies and prejudices about the disputants.[109] The disputants are, more often than not, inclined to abide by the mediator's opinion because he or she is still perceived as someone acting with the expertise and authority of the court to which the mediation program is connected.[110]

---

[106] See Welsh, *supra* note 86 at 5.
[107] See *ibid.*
[108] Henry J. Brown & Arthur L. Marriot, *ADR Principles and Practice* (London: Sweet & Maxwell, 1993) at 116.

### 3 Caucusing and Reduced Contact between Disputants

In non-court-annexed mediation, mediators usually allow parties ample time to tell their own stories and for "a reasonable amount of venting of emotions to occur" in order to pave way for better communication and understanding of each other's positions.[111] Caucuses are used when it is necessary to gain the trust and confidence of the disputing parties, probe for the real issues and interests, or analyze and point out weaknesses in each party's case. By acting as the bridge connecting the parties, mediators may also employ caucusing to explore different options and consider the risks and uncertainties that may arise in the event that a dispute fails to settle.[112] However, as effective as caucusing is in facilitating classic mediation, it should not replace the voices and stories of disputants.[113]

---

[109] *Ibid.*

[110] Most court rules seek to confirm the independence of the mediation process by de-emphasizing the authority of the court in determining the outcome of mediation negotiations. However, lay litigants who have either been pressured or merely referred to mediation by the court may likely be suspicious of how the court would react to their uncompromising attitude at the mediation, in the event that the case goes back before a judge. Being in that frame of mind, participants are likely to be vulnerable to evaluative interferences of the mediator.

[111] Sochynsky, *supra* note 98 at 41.

Caucusing was used to facilitate discussions in the early days of court-connected mediation, when mediation was restricted to small claims, neighbourhood and family disputes. One of the reasons for the use of mediation then was to determine its workability in resolving disputes that do not involve complex legal issues.[114] However as the need to decongest the courts increased, mediation was applied to more complex legal disputes with the aim of achieving settlement in a cheap and timely fashion.[115] The extension of court-connected mediation to cases involving personal injury, contract and other civil non-family disputes necessitated the adaptation of the mediator's technique to overcome the complexity involved in such situations.

---

[112] *Ibid.*

[113] See Welsh, *supra* note 90 at 791. In the Neighbourhood Justice Centre of Atlanta, for example, mediators were instructed to allow the parties to a dispute the opportunity to fashion between or among themselves an agreed and satisfactory solution to their problems and to use caucusing only after all sides have had the opportunity to tell their stories and an attempt has been made at resolving the dispute in a joint session: The Neighbourhood Justice Centre of Atlanta, *Training Manual For Mediators* (Atlanta: Neighbourhood Justice Centre,1987) at 17 and 49.

[114] The incorporation and use of mediation in those types of disputes was the result of the recommendations made by Professor Frank E. Sander at the Pound Conference of 1976 and the success achieved in the ensuing experiments in the three US cities of Atlanta, Kansas City and Los Angeles: see Peter Lovenheim, *Mediate, Don't Litigate* (New York: McGraw-Hill Publishing, 1985) at 5.

[115] As a result of the proven effectiveness of mediation in resolving disputes in situations where parties voluntarily agree to mediate their dispute, many advocates of mediation canvassed the opinion that mediation and other ADR methods can aid the courts in reducing the volume of cases: See e.g. Nancy Welsh, "The Lawyers' Buffet: Options in Resolving Disputes" (1987) 44 Bench & Bar of Minn. 17 at 18.

In order to secure settlement and dispose of cases as quickly as possible, some mediators reduce contact between the disputants and concentrate on the caucus.[116] The mediators' style may also be influenced by the fact that some parties in mandatory mediation are unwilling participants holding tightly to their positions or whose relationship with each other has indeed gone sour. It becomes important for the mediator to buffer parties' "intentional and unintentional barbs and threats" by using caucuses, thereby diffusing tension that might otherwise hinder negotiations if parties were to communicate directly with each other in joint sessions.[117] The common use of this mediation technique has prompted the description of court-annexed mediation as "nothing more than a formalized settlement procedure" used by the courts to broker financial deals between disputants as quickly as possible.[118]

Much of the satisfaction in mediation lies in the storytelling stage and joint sessions because of the uninterrupted opportunity given to disputants to tell their own stories with their own voices and in their own ways. As observed by Sternlight :

---

[116] Concentration on caucusing is often premised on the fear that constructive negotiations and settlement might be hampered by the hostile and inflammatory outbursts that are likely to occur in joint sessions. Through caucusing mediators are better equipped to control the exchange of information between parties and transform the negotiations into a bargaining process. See Gordon, *supra* note 95 at 382; See also McAdoo, *supra* note 100 where it is reported that a study revealed that approximately 62% of attorneys who had participated in court-annexed mediation program of Minnesota perceive that mediators use caucuses almost exclusively.

[117] Welsh, *supra* note 90 at 792. The point has to be made that evaluative intervention on the part of the mediator can not be justified on any of the points raised because as shown by research, mediators can employ communication skills to enhance direct and constructive negotiations between parties in joint sessions. For skills and ways of facilitating communication between negotiating parties: See Jeffrey Rubin, "Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations" (1980) 87 Psych. Bul. 379 at 382 – 383.

[118] Steven Weiss, ADR: A Litigator's Perspective: Viewing the Pluses and Minuses" Bus. Law Today (Mar./April, 1999) 30 at 32.

> Mediation allows participating clients to see with their own eyes, speak with their own voices and use their own creative talents. By participating directly in mediation, the client has the opportunity to view the opponent, the opponent's attorney and any witnesses directly rather than through the filter of her own attorney. A good mediator can facilitate these opportunities. For example, whereas the attorney may have responded cynically to the opponent's apology, it may be meaningful for the client. Where the attorney may have regarded the opponent's story as hogwash, the client may see it as compelling. That is, the client's view is not restricted by the lawyer's cold, rational, and perhaps even cynical lens.[119]

The opportunity for self-expression and story telling which disputants usually get in mediation is so fundamental that the disputants' perception of procedural fairness of the process is dependent on whether or not they have been given the opportunity to be heard.[120] The role of the mediator is to manage the process by setting the ground rules and explaining the importance of treating each other with respect so each party is heard. This role is even more important when courts reduce the autonomy of litigants by ordering them into mediation as the necessity to ensure quality of communication and respect increases. Recognizing this is important to demonstrate that the incorporation of mandatory mediation into the judicial process is not intended to rob the process of the dignity and value classic mediation places on disputants to achieve cost-effectiveness and speed. This does not necessarily require the elimination of caucusing, but requires provision of sufficient time for parties to express and explore interests and options with each other.

---

[119] Jean R. Steinlight, "Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-adversarial Setting" (1999) 14 Ohio. St. J. on Disp. Res. 269 at 343-344.

[120] Studies show that the main reason litigants rated mediation more highly than adjudication was that mediation gave the disputants an outlet for their emotions and an opportunity to tell their stories and therefore they had greater confidence that the third party understood what their dispute was about: Craig A McEwen & Richard J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 Me. L. Rev.237 at 256; Lind et al., "In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System" (1990) 24 Law & Society Rev. 953 at 981.

### 4 Monetized Settlements

Civil suits usually involve claims for money by way of damages for harm suffered but payment of monetary compensation might actually not fix the real problem that brought about the suit. As elaborated in Chapter Two, in classic mediation, parties have the chance to explore each other's interests, and with the help of the mediator, generate creative options for resolving disputes. For example, while it should be expected that an employee who feels unfairly treated by his or her employer might be interested in obtaining compensation for the unfair treatment, it could be that acknowledgment of the wrong done to her and apology from his or her employer means more than compensation. The time to draw out all of the interests in issue, an essential element in mediation, is often lacking in court-connected mediation programs because of the time limits imposed and tendency of both the mediator and lawyers to focus on the rationale for damages claimed and thereby transform the disputants' stories into financial terms.[121] This transformation increases the likelihood of deal making and minimizes the need for the disputants' stories to be told in their own way and their special, but non-monetary, needs and interests to be addressed.[122]

## D. Positive impact of Court-annexed Mediation on Litigation and Legal Practice

Despite the pervasive influence of adjudication, court connected mediation has been able to make some positive impacts on the legal system in different ways. Court-connected mediation programs provide parties who are already in the litigation track with an alternative, or at least introduce them to an alternative way they may choose for resolving their dispute. It has increased the services offered by the courts, but unlike the ideal "multi-door courthouse" described in Chapter One, disputants are still left with little or no choice regarding what method to use to resolve their disputes. [123] Except in very few instances, such as the British Columbia's Notice to Mediate system where the parties have control over the timing and appropriateness of cases for mediation, parties are either compelled to mediate their cases or referred to mediation when the court deems it right for the parties.[124] The lack of choice in court-annexed mediation programs hinders the judicial process from attaining a step towards the institutionalization of multi-dimensional approach to dispute resolution.

---

[121] In tort cases, the plaintiffs' desire might be to vindicate rights by establishing the wrong done to them by the defendants. However, the lawyer's overwhelming focus when negotiating with opponents is the monetary value of the wrongs to the plaintiff. See *e.g.* Deborah R. Hensler, "The Real World of Tort Litigation" in Austin Sarat et al., eds., *Everyday Practices and Trouble Cases* (Evanston, Ill: Northwestern University Press, 1998) 155 at 162-63.

[122] See Welsh *supra* note 90 at 802.

[123] As discussed in Chapter One of this thesis, Professor Frank E. A Sander argued that flexibility, efficiency and fairness can be infused into the litigation processes of jurisdictions across the United States by the creation of "a multi-door courthouse" which shall offer a variety of dispute resolution services in one place, with a single intake for the purpose of screening clients and determining the dispute resolution process that would best serve their needs: Warren Burger, "Agenda for 2000 A.D – A Need for Systemic Anticipation" (1976) 70 F.R.D 83 at 92.

The implementation of mediation programs in courts has, in some situations met the objective of quicker and cheaper resolution of disputes thereby helping to curb the delay associated with litigation. For example in the early days of court-annexed mediation, American studies showed that it could reduce the median filing-to-disposition time in contested cases by about seven weeks and also make a substantial reduction to the costs incurred by litigant while resolving their dispute.[125] In Ontario, the evaluation of the Toronto ADR Centre has also shown that, depending on the case type, the mean time for non-mediated cases to settle was more than twice as long as what it took mediated cases to settle and that mediation saved costs for both the justice system and litigants.[126] However, the fact is that lawyers and disputants make efforts to settle their disputes when cases are ongoing. What is often experienced as settlement in mediated cases within the courthouse is the result of discussions that had already begun by lawyers and disputants.[127]

---

[124] *Notice to Mediate (General) Regulation*, B.C. Reg.4/2001, s.3 c.f Ontario, *Rules of Civil Procedure* (Court of Appeal and Supreme Court of Justice), r.24.1.01, r.75.1.02 (2) & r.75.1.05 (4) where parties have no choice with respect to civil [non-family] actions that are subject to case management since such cases must pass through a mandatory three-hour mediation session if they are to continue on the litigation track. Again, in contested estate, trusts and substitute decision cases parties can only have their cases mediated if they obtain a referral from the court by bringing a motion for direction in that regard: Ontario, *Rules of Civil Procedure* (Court of Appeal and Superior Court of Justice), r.24.1.01, r.75.1.01, 75.1.02(2) & r.75.1.05(4). In Saskatchewan, with regard to every non-family civil action, it is the court that initiates mediation by forwarding the case file to the Saskatchewan Justice Dispute Resolution office where the necessary steps are taken to set up mediation for the parties: *The Queen's Bench Regulations*, R.R.S 1999 c. 1-1.01, O.C 433/99, s.2 (1).

[125] Stevens H. Clarke et al.," Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of its Effects" online 56 (1996). This tends to confirm the argument of the advocates of court-annexed mediation. See however, James S Kakalik et al, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Santa Monica, C.A: Rand, 1996) at 48 which found that the use of mediation and early neutral evaluation as mandated by the *Civil Justice Reform Act* has not resulted in significantly quicker settlements or reduced expenses.

Because classic mediation centers on interests and de-emphasizes rights and positions, it is possible through court-annexed mediation to "grant a voice to those who might not have the right of articulation in law."[128] If the process is managed by a skilled mediator with experience in facilitative mediation, court-annexed mediation has the potential to liberate litigants from the law's pre-occupation with rights, categories and other procedural encumbrances prevalent in litigation. When discussions are properly facilitated, classic mediation neither uses the normative standards that are applicable to adjudication nor pursues goals like truth, objectivity and "fact finding". For example, it is possible for a plaintiff whose rights to pursue judicial remedies have been extinguished by legislation to still find himself involved in good-faith negotiations with a defendant prompted to negotiate by other considerations. Also, mediation concepts like restitution and apology can be put to effective use where it is evident that a monetary award might not adequately rectify the harm done.

---

[126] Julie Macfarlane, "Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre" in Julie Macfarlane ed. Dispute Resolution: Readings and Case Studies (Toronto: Emond Montgomery Publications, 1999) 681 at 684. In cases of breach of contract/negligence for example, it was shown that where settlement was reached through mediation, cases had 129 and 126 mean and median timelines respectively while the same type of cases which were disposed of without mediation had 288 and 201 mean and median timelines respectively.

[127] In the Ontario case, for example, it was only 8.9% and 8.3% of clients who participated in the court mandated mediation that indicated there had been no informal or formal offers to settle. About 53.6% of lawyers indicated there had been more than one informal offer to settle the case, 44.6% agreed there had been more than one formal offer to settle, 42% of clients replied that there had been more than one informal offer to settle and 58% indicated that there had been one formal offer to settle: *ibid.*

[128] Michael P. Silver, *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths, 2001) 179.

Though court-connected mediation is often dominated by lawyers who are versed in the technicalities of the court system, it still has the potential to demystify the law and its processes by providing opportunities to members of the public to negotiate settlements to their disputes. Litigants are more likely to follow and understand the direction their cases are going when the cases are mediated, than when they are adjudicated. This is particularly important for business people who possess great negotiating skills and experience which can be used to a great effect in devising solutions tailored towards their corporate needs.

Court-annexed mediation is also having increasingly significant impact on the attitude and practice of lawyers in jurisdictions where it is implemented. There is the tendency for the level of scepticism regarding mediation to decrease among lawyers after they have been consistently compelled to use mediation. For example, Macfarlane points out that there has been a remarkable shift from rejection to acceptance of mediation among Toronto lawyers after some years of mandatory mediation in Toronto courts.[129] Court-annexed mediation, especially when it is coupled with deadlines created and enforced through the case management system has also affected file management strategies of legal practitioners. The idea of early mediation implies that more work should be done at the commencement of the action in order to be ready for discussions and possible settlement of the case. Preparation in this respect involves analysis of the interests and the perspectives of the opposing side rather than focusing exclusively on the position of the lawyer's client.[130]

It is important to note, however, that just as mediation has impacted on litigation and legal practice so has it created problems in jurisdictions were they are implemented. Some of these were identified in my discussions of adaptations to the classic mediation process. The section that follows identifies and analyses other general problems associated with court-annexed mediation.

---

[129] Julie Macfarlane, "Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program" online: Law Commission of Canada<http://www.lcc.gc.ca.> at 69. However, the higher degree of acceptance of mediation among Ottawa lawyers reflected the five year difference of the use of mandatory mediation in the two regions.

[130] This point emerged as one of the consistent themes in the responses given by members of Ottawa Bar regarding the effect of mandatory mediation on their practices. See *ibid.* at 66.

## E. General Problems of Court-Annexed Mediation

In jurisdictions across Canada court-connected mediation programs as presently run can foster some of the problems they are created to alleviate and generate more problems for the legal system.

### 1. Cost and Delay

Mediation may create heavier financial burdens to litigants where the dispute is not settled through mediation. However every litigant that files an action in court knows that litigation comes with a high cost and, no matter how strong your case appears, there is still the possibility of losing to the other party. The cost increases where mediation is viewed as another step in the litigation process. Where mediation is mandatory, litigants often have to cover the cost in addition to the legal fees for pursuing the claim in the event that the case fails to settle. For example in Ontario, the evaluation of the Toronto ADR pilot scheme showed that only 54% of 555 cases sent to mediation between 1 January to 30 September, settled either in full or in part.[131] The implication is that in about 46% of the cases that did not settle, litigants have to continue along the litigation track after incurring legal fees and the cost of mediation. For cases that merely settled in part, there are chances that the disputants will revert to litigation if conditions upon which the settlement is based are not met. This increases the percentage of cases in which the litigants are likely to incur more costs by reason of having to continue with litigation after using mediation.

---

[131] Julie Macfarlane, *supra* note 126 at 682.

The situation is somewhat different in jurisdictions where the cost of mediation or part of it is born by the government. In those cases, the financial burden rather than being borne by the litigants is shifted to the tax-paying members of the public. In Saskatchewan, for example, the first three hours of every mediation session in civil non-family cases are funded from the public funds and litigants do not pay for them, but the subsequent hours are paid for by the litigants.[132] In the event that the case fails to settle within the first three hours or after the time for mediation has been extended, the expenses incurred by the government will have been wasted and the parties on their parts would still pay for the legal fees to pursue their claims after also spending time and perhaps legal costs in mediation.

Associated with the problem of cost is the issue of delay. When a case fails to settle at mediation, the litigants add time spent at the mediation to the length of time it is going to take for resolution through litigation. The additional time includes the time it takes to prepare for mediation and complete the pre-mediation processes, the time spent in mediation proper and the time it subsequently takes to have the cases litigated. The argument that court-connected mediation helps for speedy disposition of cases is rendered spurious when studies have shown that about half of the cases sent to court-annexed mediation programs do not actually settle.[133] On the other hand, the process may also help narrow the issues to be litigated and streamline the dispute.

---

[132] Keet & Salamone, *supra* note 14 at 61.

### 2. Negative Impact on Development of Law

The law of western society encompasses all the sources available to its legal community in its role as the justice administering machinery of that society. In common law jurisdictions the sources include statute, case law, and principles of equity and rules of common law. Rules of common law originated from customs and practices prevalent in different shires of England and continue today to arise from facts and circumstances of disputes brought before the courts. Statutes are the response of the legislative arm of government to perceived inadequacies of other sources of law, including existing statutes and common law, while equity seeks to fix the problems created by the rigid application of the law to cases that come before the courts.[134] By using the cases that come before them, courts either determine what the law is on the particular issues put forward by the parties or develop the law further by making pronouncements on those issues, if there has not been a previous binding decision by a court of competent jurisdiction. In this way litigation gives courts the opportunity to build precedents, using the doctrine of *stare decisis* or to excise existing precedents from the body of law through mechanisms such as the doctrine of mistake.[135]

---

[133] See Macfarlane, *supra* note 126 at 682.

[134] F.C DeCoste, *On Coming To Law: An Introduction to Law in Liberal Societies* (Toronto: Butterworths, 2001) 67.

The effect of the right application of statutes, common law, equity and case law is the predictability which it gives the law and equal treatment of people under the law. Mediation shields disputes from the public application of legal norms and standards. Rather than provide the opportunity to develop law and apply it consistently, court-annexed mediations result in private deal making. The doctrine of confidentiality with which mediation is clothed also makes it difficult for courts, law makers and commentators to determine how existing laws fare against cases that are being mediated.

Mandatory court-annexed mediation hinders the development of the law in another sense. It deprives citizens who elect to use the law for the resolution of their dispute immediate access to due process and impartial application of law. It also constitutes an impediment to the right of individuals to transact and contract freely in the society. For this reason and other problems associated with mandatory mediation, it is believed that disputants will fare better if the choice to mediate a dispute is left entirely in their hands while the court restricts itself to a conflict between parties.

---

[135] *Ibid.* at 68. The doctrine of *stare decisis* ensures that the rules of law which have been previously articulated and applied in the past govern all present and future cases to which they authoritatively apply, while the doctrine of mistake allows precedents which the courts have found to be erroneously erected to be excised from the body of the law.

### 3. Pressure and Timing of Mediation

Pressure, whether overt or covert is the main instrument used by courts to ensure that parties are made to mediate disputes. Coercion is overt where parties are expressly obligated to submit certain classes of dispute to mediation before continuing along the litigation path.[136] In other situations, the litigants decide to mediate but the entire process then slips into the control of the court. In Alberta, for example, while mediation is not mandatory for civil cases coming before the Court of Queen's Bench, once the Request to Mediate is filed, all parties are bound to attend the mediation unless an exemption is obtained from the mediation co-coordinator or a judge.[137]

Related to the issue of pressure is timing. In order to dispose of cases as quickly as possible, mediation is usually required very early in the litigation process.[138] Litigants who file actions in court believe they have claims to pursue and may not at the commencement of their actions consider mediation the best way to resolve the dispute. Mandatory mediation programs may function more effectively if they allow litigants the choice to determine when to mediate their disputes. Although mediating cases early in litigation may produce desired results, litigants may need to carry out more pre-trial preparations before being able to evaluate whether or not mediation would be a better option. For example, the settlement rate for cases mediated under the Ontario mandatory mediation program is reported to be lower than that achieved in both Toronto and Ottawa Pilot Projects. The reason being probably because many cases in the original pilot schemes did not come for mediation as early in litigation. Many cases arrived either on consent after discoveries and exchange of documents or after pre-trial conferences. Some were also sent for mediation after the completion of all pre-trial formalities and shortly before parties go to trial.[139]

---

[136] See *the Queen's Bench Regulation, supra* note 25, s.2 (1) which empowers the court to initiate mediation for every non-family civil case.
[137] Alberta, *Alberta Rules of Court*, r.4.
[138] In Saskatchewan, for example, it comes immediately after the close of pleadings. See the *Queen's Bench Act, supra* note 40.

### 5. Quality of Mediators

The services of mediators like other things in a market-driven economy are determined by the market forces. The demand for vastly experienced, competent and skilful mediators is bound to be very high and they are likely to attract high fees as well. In court-annexed mediation, litigants are either assigned mediators or required to choose mediators from rosters. Services of the mediators are either available at fixed prices or are defrayed by the courts.[140] Top class mediators may not be willing to mediate cases using the scale of fees set by the government if they can earn much more when engaged privately by disputants outside the judicial process. There are also concerns with respect to qualifications, experience and skill of mediators on the court rosters.[141]

---

[139] Silver, *supra* note 124 at 156.

[140] See earlier discussions under the Ontario and Saskatchewan examples.

## F. Addressing some of the Problems in Court-annexed Mediation

Despite the problems discussed above, mediation can find a comfortable home in judicial process. However, steps need to be taken to fix the problems in court-annexed mediation. Some of the more fundamental problems raised in this chapter are considered in this discussion.

### 1. Training and other Enlightenment Programs

Scepticism shown by most litigants and lawyers to mediation stems from ignorance and uncertainty and shall remain the case as long as the people are ill-informed about mediation in general, and court-annexed mediation in particular. Litigants stick to litigation neither because they are enthralled by the "black-robed judges, well-dressed lawyers, and fine paneled courtrooms" nor because they believe that the process is the best for resolving their disputes.[142] It was rightly observed in the United States:

---

[141] See Macfarlane, *supra* note 122 at 50.

[142] Warren E. Burger, "Our Vicious Legal Spiral" (1977) 4 Judges' J. 22 at 49.

> Experience with court mediation programs has shown that voluntary programs are often underutilized. In spite of the increasing number of ADR programs, in courts and communities, mediation remains a largely unfamiliar process to judges, court administrators, citizens and attorneys. Judges, lawyers and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.[143]

The situation is complex because of the widespread ignorance on the part of lawyers who ought to advise potential litigants about mediation and its potentials to solve their problems. In some cases, lawyers that are informed are unwilling to tread the path of mediation with their clients because they believe suggesting mediation to clients might portray them as weak and incompetent or is contrary to their role as advocates for legal rights. Education about the objectives of mediation and their professional responsibility as lawyers beyond the role of advocate is therefore crucial.

Although ADR courses have been incorporated into the curricula of many law schools in Canada, unlike the core courses which are usually compulsory, ADR courses are considered peripheral to legal education and therefore optional. The result is that only a fraction of the law students' population learns about ADR, its benefits and the proper role of lawyers in facilitative mediation. For adequate preparation of lawyers and a change in orientation, ADR should receive the same type of attention and emphasis given to courses like evidence and constitutional law and be made compulsory. Enlightenment programs like workshops and seminars need to be used extensively to reorientate judges and other lawyers that did not have the opportunity of studying the concept, process and potentials of mediation in their university days. The enlightenment of judges is particularly important because it will be a lot easier for well-informed judges to suggest, after assessing cases that come before them, the use of mediation or other ADR processes to litigants and their counsel. When such suggestions come from the bench, they may be accepted by lawyers who might be reluctant to make the suggestion.

---

[143] Center for Analysis of Alternative Dispute Resolution Systems & The Institute of Judicial Administration, Report on National Standards for Court-connected Mediation Programs, quoted in Welsh *supra* note 86 at 24.

## 2. Regulation and Ethical Guidelines

If litigants and lawyers are properly informed about the purpose of and their roles in court-annexed mediation they have a better chance of participating actively in negotiations notwithstanding the presence of their lawyers. Business people, for example, when involved in mediation whether private or court-annexed, are likely to use their vast experiences and skills to create business solutions to their problems.[144] However, the intractable problems of evaluative intervention on the part of mediators and lawyers are not likely to be completely solved through retraining and re-orientation. It may be necessary to use statutes, court rules and ethical guidelines to maintain standards of classic mediation process if satisfaction, and not just settlement, is considered an important goal.

---

[144] See Macfarlane, *supra* note 125.

It is generally known that a mediated agreement can be vitiated if it is proven that parties have either been coerced or manipulated into settlement. However, the burden of proving coercion or any other vitiating element lies with the party that alleges it. Because mediation sessions are usually covered by a confidentiality agreement or rules of confidentiality it may be difficult for the party to discharge this onus. A solution might be a regulatory framework that clearly articulates elements for a valid mediated agreement such as: [a] the disputants themselves were actively and directly involved in the negotiations and creation of settlement options; [b] disputants were given the opportunity to tell their stories in the presence of all participating parties and the mediator during the mediation session; and [c] the final outcome of negotiation is based on options as discussed by the parties. That is to say, parties must have had the option to freely exercise their right to either reject or accept it during mediation. The framework could also require every party who participates in court-annexed mediation to file a confidential report to the court within a few days of completion of mediation wherein he or she indicates the extent the mediated agreement complies with stated requirements.

It is also a good idea to provide for a "cooling off" period before an agreement is enforceable. The cooling off period is a time within which disputants who have concluded negotiations and reached settlement through mediation can reflect on the process and the settlement reached and either exercise a right to rescind the agreement without negative consequences or choose to ratify it by doing nothing more. Such a period may help keep lawyers out of the mediation process. On the other hand, it may also provide lawyers not supportive of interest-based mediation to encourage clients to reject an agreement if a better result might be achieved in the courts. Regardless of the lawyer's absence or presence at the mediation, he or she has the duty to ensure the client is aware of his or her legal rights and potential outcomes.

Cooling off periods been applied in the United States to protect contracting parties in contexts where high pressure tactics are known to be employed to obtain acceptance to contracts. In Minnesota, for example, a mediated agreement between a debtor and his or her creditor is not binding until seventy two hours after it has been executed and during that time either party may revoke the agreement with negative consequences against him or her.[145] Also the Congress imposed a three-day cooling off period on a home sales agreement when it was realized that many home buyers were actually being pressured into purchasing deals packaged by house marketers.[146] A cooling off period for settlement agreements can be very effective in protecting disputants who have been influenced by the mediator's opinion during mediation. The likelihood of rescission of the agreement at the instance of any of the disputants will also encourage mediators to be more facilitative rather than manipulating mediation sessions for the purpose of achieving settlements.

---

[145] *Minnesota Civil Mediation Act*, 2005 Minn. Stats.572.31 at 572.35 (1988).

[146] U.C.C.C. §2.501 cmt. 1(1968). Stressing the importance of this provision a judge opined that the use of cooling off period has made it possible for the prospective homeowner to "act on sober second thought and the wisdom of making the purchase or hiring the services on the terms agreed to." *Donaher v. Porcaro* [1999] 715 N.E. 2d. 464 at 468.

Codes of ethics guiding mediators and lawyers should also include a duty to advise disputants about their rights in mediation. Strict adherence to this will help restore the integrity of the mediators' craft and also improve the quality of mediation in court-annexed programs.

### 3. Modifying the frameworks of Court-annexed Mediation through Court Rules

The methods adopted for incorporating mediation into the judicial processes in jurisdictions across Canada differ from the models put forward by early advocates of mediation. Early advocates proposed a multi-dimensional dispute resolution mechanism epitomized by the concept of the multi-door courthouse which would offer litigants the opportunity to select a dispute resolution method best suited for their dispute as part the judicial process.[147] However, rather than adopt mediation based on suitability to resolve a dispute on a voluntary basis, court rules in many provinces perceive mediation as a tool to effect cheap and easy disposition of cases and coercion is used to ensure compliance by litigants.

---

[147] See discussion on the emergence of mediation in Chapter One.

Mediation can still be very helpful in tackling the problems of delay and congestion if it is adopted as one of a range of services to be provided by the court and not the only case-management tool. Combined with effective educational programs that increase the likelihood of parties pursuing mediation, government assumption of some of the costs of mediation can help achieve this goal and avoid some of the problems associated with mandatory processes. It is therefore suggested that the rules be amended to include other ADR options, mediation being one of several dispute resolution methods that disputants may elect to use.

As already pointed out, members of the public, when properly informed, should have no qualms walking into the court premises to have their disputes mediated. Also, if satisfaction is recognized as an important aspect of settlement, it is less likely that mediators will be under such intense pressure to secure settlement, since disputants who voluntarily elect to have their dispute mediated are likely to be more open and frank in their negotiations and also more likely to settle without prompts. They are also less likely to break settlement agreements and generate new litigation. Ideally, fees to be paid should be as determined by the agreement between the parties and the mediator within a range consistent with the market for mediator skills to ensure quality and experience. With that, court-annexed mediations can increase and sustain the interests of mediators of proven experience and competence.

## 4. Discretion and Control of time

For reasons already given, litigants should have some measure of control and flexibility with regard to the time that they have to try mediation within the litigation process. It is suggested that rather than refer parties to mediation after the filing of pleadings, rules can be amended to make mediation a condition precedent to fixing a matter for trial. This will eliminate the problem of forcing parties into mediation when they are least prepared for it. In order to prevent the use of delay tactics by parties, rules can also provide that the court shall not entertain interlocutory applications from parties unless a party has made reasonable attempts at using mediation to resolve the dispute.

# CHAPTER FOUR

## COURT-ANNEXED MEDIATION PROJECT OF LAGOS STATE, NIGERIA

### A. Introduction

The court-annexed mediation program of Lagos State, called the Lagos Multi-door Courthouse (LMDC), commenced its journey in 2001 with the pioneering efforts of The Negotiation and Conflict Management Group (NCMG) which sold the idea to the Lagos State Judiciary. Having obtained the blessing of the Chief justice of Lagos State, the program was launched on June 11, 2002 as the first and still the only court-annexed program in Nigeria.[1] It is not surprising that a project like this should commence in Lagos State, considering its status as the commercial heartbeat of Nigeria and the volume of cases handled by her courts.

The Lagos Multi-door Courthouse is not completely integrated into the litigation process but modelled after the proto-type multi-door courthouse advocated at the Pound Conference of 1976.[2] Its objective is to "enlarge resources for justice by providing enhanced, timely, cost-effective and user-friendly access to justice for would be and existing plaintiffs and defendants."[3] This informed the inclusion of mediation, early neutral evaluation and arbitration as the three doors available at the LMDC. However, while it is believed that more doors shall be included as awareness grows and as more resources become available, mediation is currently the only process being used at the LMDC.[4] Although it is understood that the courts have a very important role to play, the program places emphasis on the roles to be played by both counsel and parties for the mediation to succeed.[5]

---

[1] Kehinde Aina, "The Lagos Multi-door Courthouse – One Year After" Paper presented at the workshop on "The Lagos Multi-door Courthouse: The Procedure and Promise' held at the foyer of Lagos High Court, September 30, 2003 [unpublished] 1

[2] See discussion in Chapter One at 8 – 9.

[3] Lagos, *The Multi-door Courthouse Practice Direction*, art.1.

In this final chapter I begin by describing the procedure and rationale for the Lagos Multi-door Courthouse Model. This is followed by a discussion of mediation in the Nigerian cultural context, and a comparison of the Lagos Court-annexed program and court-annexed processes discussed in Chapter Three. The thesis concludes with some lessons to be learned from Canada.

## 2. Scope and Procedure

There are five ways of bringing cases for mediation in the Multi-door Courthouse for mediation. These are listed below.

1. The presiding judge may order parties in an ongoing case to try mediation at the LMDC or advise parties on the suitability of their case for mediation.

---

[4] See Aina, *supra* note 1 at 4. Aina points outs out that mediation is adopted as the primary process because of the experiences of similar programs in the United States and Canada. This assertion gives the impression that the other doors are still used when the need arises. However, my interview with the staff of the Centre showed that mediation is the only process that is used for resolving cases. If a case is considered inappropriate for mediation, the parties are referred back to the court or advised to seek other remedies.

[5] *Ibid.*, arts.5 & 6.

2. The LMDC may directly intervene in an ongoing case at the instance of either the director of the center or a serving judge, both of whom have the power to invite litigants to explore the possibility of resolving their dispute by mediation. This might occur when the director or the judge is of the opinion that mediation is the appropriate method to be used in resolving a particular dispute. However, the difficulty in this provision is that there might be no connection between either the director or a serving judge (other than the judge hearing a particular matter) and the parties for them to know the nature of the case in order to make their recommendations.

3. Parties in pursuit of a prior contractual agreement stipulating mediation as a method of resolving their dispute may use the LMDC.

4. Where there is no prior contractual agreement to mediate, cases can still be brought to the LMDC through walk-in by litigants or parties whose disputes are not before the court, their attorneys or any other designated officer of the court. Unlike most Canadian court-annexed mediation programs this occurs at any time prior to or after the commencement of an action in court.

5. Also unlike Canadian court-annexed options, a person who is not a party to a dispute but who has an interest in the dispute, or who believes that the LMDC could be beneficial to an ongoing dispute or to the parties, can also bring a case to the attention of the Centre.

Proceedings are commenced at the LMDC either upon completing and filing of a Request Form by walk-in parties or their counsel or upon issuing a Notice of Referral to counsel for the parties, or to the parties themselves where they are not represented by counsel.[6] Similar to the process for some mediations in Ontario, the Request Form is submitted along with four copies of each party's statement of issues and the documents the party deems important to his or her case. The statement of issues outlines the interests, factual and legal issues involved in the case from the party's perspective. Once the Request Form and the statement of issues are received by the Centre, a Notice of Referral is served on the other party or their counsel within seven days along with a Submission form (Form 2). He or she is required to complete the form and forward it to the LMDC within seven days along with four copies of his or her statement of issues.[7]

When the parties have completed and filed their statements of issues, the ADR registrar exchanges the statements of issues between the parties and may invite the parties for an intake screening.[8] The screening, which involves the exchange of information between a trained officer of the center and the disputants, is designed to determine the most appropriate method for resolving any dispute that is brought to the center. If the dispute is considered suitable for mediation, the officer explains the process to the parties and clarifies the issues in dispute with them. The parties are also expected at this stage to fill out and file two forms with the center - Confirmation of Attendance Form and Confidentiality Agreement Form. Like confidentiality mechanisms adopted in Canada, the latter form provides that statements made and documents exchanged between parties during mediation or in pre-mediation meetings are not subject to discovery and are also not admissible in evidence. Notes and records made by the mediator or any other person during mediation are also confidential and the mediator cannot be subpoenaed to give evidence of what transpired in mediation.[9] Failure to file the appropriate form may result in a cancellation fee being levied on the party and in respect to cases referred to the center by the court, a Certificate of Default may be issued and placed in the court's file.[10] The Certificate of Default notifies the court about the failure of either of the parties to a dispute or their counsel to comply with any of the pre-mediation steps. There is no provision for sanction against a defaulting party. However, it is likely that the defaulting parties may be sanctioned for being contemptuous of the court, which ordered them to try mediation at the LMDC.

---

[6] *Ibid.* art 2.2(a) & (b).

[7] *Ibid.* art 2.2 (b)-(c)

[8] *Ibid.*

Although lawyers are not allowed to attend the mediation sessions on behalf of absentee parties, parties who are represented can attend with their lawyers and the attending parties must have full authority to settle the dispute.[11] Having the authority to settle is important to ensure that the process is not delayed by the need to obtain approvals from superiors when persons who have no power to bind the parties to the dispute conduct negotiations. It is provided that LMDC will provide the parties with profiles of recommended neutrals from which parties themselves should choose their own mediator. However, in practice LMDC usually nominates and introduces one of its in-house mediators to the parties.[12]

---

[9] *Ibid.*, art. 5.1(b).
[10] *Ibid.*, art. 3.3.

The proceedings are confidential and every mediator is immune from liability with respect to his or her conduct during mediation sessions so long as she complies with the standards set by the NCMG.[13] This type of blanket protection for mediators does not augur well for the process. Mediation should not be used to cover up fraud, crime or illegality. While it is important to protect mediators from unnecessary lawsuits, mediators and parties should not be allowed to hide behind the veil of confidentiality to breach the law. For example, where the law imposes an obligation on persons to report crime or conspiracy to commit crime, a mediator who fails to make such report with regard to any crime that comes to his or her knowledge during mediation should be held accountable to the law. It is believed that the Nigerian courts will not fail to pronounce the unqualified protection given to mediators null and void whenever the issue comes before them.

---

[11] *Ibid.*, art. 4.1.

[12] The LMDC makes use of its in-house mediators probably because there are very few trained, experienced and competent mediators in Nigeria. Unlike Canada, there is no roster of mediators from which to choose.

[13] Lagos, *supra* note 3, art. 5(c).

If a dispute is resolved through mediation, the settlement agreement must be in writing, signed by either the parties or their counsel and where the matter is still pending in court, the settlement agreement must be filed with the court within 10 days of execution.[14] Like in the Canadian context, there is no cooling off period or regulations to ensure that the principles of classic mediation have been followed in reaching settlement. Cases referred to mediation by the court may continue along the litigation path where mediation sessions have not yet been held and a Certificate of Inability to Resolve through ADR has been executed on behalf of all the parties or at least one of the parties. In the event that no mediation session has been held within three months of the date of the Notice of Referral and the Center has issued a Certificate of Default and filed it in the court from which the case originated, the case is returned to the general cause list.[15]

## 3. Rationale

Like other countries that were formerly under British rule, Nigeria inherited the English common law system. However, there have been arguments that it is not appropriate to describe Nigeria as a common law jurisdiction since the indigenous methods of social control that existed in the pre-colonial Nigerian societies developed valid rules which not only outlived the British rule, but continue to be relevant in contemporary times.[16] As sound as these arguments are, the fact remains that the judicial process in Nigeria is purely adversarial. The Supreme Court of Nigeria explains the process thus:

---

[14] *Ibid.*, art.6.1.

[15] *Ibid.*, art.7.1[a]-[c].

> [T]here are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system...Basically, it is the role of the judge to hold the balance between contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular court and the procedure and the practice chosen by the parties in accordance with those rules. Under no circumstances must the judge under the system do anything which can give the impression that he [or she] has descended into the arena, as, obviously, his sense of justice will be obscured.[17]

It is therefore not surprising that general problems which confront other adversarial systems are also clearly evident in Nigeria. The magnitude of these problems is perhaps even greater in Nigerian jurisdictions than the more advanced common law systems due to lack of court facilities.

The first problem is delay which in Nigeria may translate to miscarriage or total denial of justice. The Constitution of the Federal Republic of Nigeria provides that

---

[16] See *e.g.* J.M Elegido, *Jurisprudence* (Ibadan: Spectrum Law Publishing) 125 where the author identified the following as some of the elements of legal systems in pre-colonial African societies:[i] emphasis on conciliation and compromise in order to readjust social relationships;[ii] emphasis on general principles and less on details; [iii] attention on group responsibility rather than limiting its force to individual parties; and [iv] frequent use of informal enforcement procedures like family units, age-groups, etc., to give effect to judicial and quasi-judicial decisions. See also J. O Asein, *Introduction to Nigerian Legal System* (Lagos, Ababa Press, 2005) at 4.

[17] *Elohor v. Osayande* [1992] 3 N.W.L.R 524 (S.C) at 541-42 per Nnaemeka-Agu, J.S.C.

> [i]n the determination of his [or her] civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established in such manner as to secure its independence and impartiality.[18]

In practice, "reasonable time" has come to mean several years because of the congestion in the court system. In *Ariori v. Elemo,* for example, the Supreme Court ordered that the matter be tried *de novo* after the case had lingered for about twenty years and one of the grounds for the order of retrial was that delay had occasioned a miscarriage of justice.[19] Excessive workload of the judges is apparently one of the main reasons for the congestion of courts in Lagos State. The Lagos judiciary has approximately fifty judges and each judge has about three hundred cases pending before him or her.[20] The problem of workload is compounded by the fact that the proceedings of the courts are recorded by judges in long hand. The disposition time for some cases is over ten years because of the time spent in pursuing interlocutory applications and other procedural steps necessary for setting cases down for trial.[21]

---

[18] *Constitution of the Federal Republic of Nigeria,* 1999, s.36 [1].

[19] [1981] I S.C.L.R 1.

[20] O. O. Oke, "Decongesting the Courts: The Place of Lagos Multi-door Courthouse" Paper presented at the Workshop on the Lagos Multi-door Courthouse: The Procedure and Promise, held at the Foyer, High Court of Lagos, September 30, 2003.[unpublished] 2.

[21] *Ibid.* The learned judge citing instances of what she experiences in her own court, pointed out that the number of interlocutory applications filed in some of the cases may be as high as six or more and in some instances cases get stuck for years when either of the parties appeal against the court's ruling on any of the interlocutory applications.

Some cases pass through different judges at different times before they are finally tried. Explaining the extent of delay that is prevalent in Lagos courts, Justice Oke observes

> … I have over 20 year old cases inherited from retired judges. These are cases that have gone before two or three judges before coming to my court. I remember vividly that the Suit No. LD/469/77: *A.J.Lawal & anr v. A. Santos* is 26 years old; Suit No. .D/89/74: *Mrs S.A Abudu v. Alhaja T. Ogunbambi & anr* is 29 years old while Suit No. LD/4/78: *Sipeolu & anr v. AIICO Eng. Group Nig. Ltd* is 25 years old. I have about 50 cases that are more than 10 years old and 140 cases that are over 5 years old.[22]

Associated with problems of delay is the cost of pursuing a claim in court. As already discussed in this thesis, the cost of litigating a claim includes legal fees, which would usually increase as the case is prolonged, the time spent in pursuing the claim and the emotional impact of the case on litigants. No matter the amount of resources at the litigants' disposal, it is doubtful if parties would believe they obtained justice from a court after spending ten years fighting interlocutory battles. Indeed, experience shows that most times cases end in Pyrrhic victories for the winners and excruciating losses for the losers.[23]

Finally, the relative rigidity of the procedural rules of the adversarial system does not allow for fast-track disposition of cases. Although Lagos State has learned from the more developed common law systems by incorporating case-management tools into its civil procedure rules, the appellate system is still rooted in the old-fashioned non-interference principle of the common law system.[24] Thus cases that are meant to be fast-tracked might be held whenever an appeal is filed on any of the interlocutory rulings emanating from the Lagos courts. There is absolutely nothing the Lagos judiciary can do to rectify this problem since the Appeal Court is within the exclusive jurisdiction of the federal government.

---

[22] *Ibid.*at 2-3.

[23] See discussion on why disputants prefer mediation in Chapter One at 16 – 23.

## B. Mediation in the Nigerian Cultural Context

Like other common law jurisdictions, Lagos State has looked to court-annexed mediation to help address the problems highlighted above. The concept of mediation is not new to Nigeria. Prior to the advent of British rule in the nineteenth century, mediation was the predominant method of resolving disputes in most Nigerian communities. It was also practised among Nigerian communities after the introduction of common law, long before the emergence of the contemporary mediation movement in the 1970s. However, unlike western-style mediation, mediation as practised in traditional Nigerian settings reflects the communal lifestyle of the people. Emphasis is placed on building consensus and compromise among disputing parties through the intervention of persons that are usually related or well known to all the parties that are involved in a dispute.[25] In contrast, western - style mediation is premised on the principle that the use of a neutral third party to facilitate communications and negotiations between parties to a dispute empowers the parties to resolve their dispute their own way in a relatively cheap and timely fashion.

---

[24] Case-management was introduced in the Lagos jurisdiction in 2004. However, the impact is not yet felt by litigants probably because of the extremely huge backlog of cases that need to be cleared by the courts before focusing attention on new actions.

As a dispute resolution method, mediation in western countries like the United States and Canada do not deviate fundamentally from adversarial adjudication which had existed over the centuries. It was designed to re-invigorate the basic character of western liberal societies by re-emphasizing individualism, equality and fair competition, which are the values upon which the societies are built.[26] As argued in Chapter One, the industrial revolution of the seventeenth century transformed the feudal England into a market-oriented society where competition of ideas, interest and rights was the norm. The competition eventually found a very fertile ground in North America which also inherited the common law system from England. Therefore, addressing the problems of delay, cost and congestion of courts with a dispute resolution method that is fast-paced, cheap and which also encourages equality, neutrality and the empowerment of the individuals is in consonance with the people's culture.

---

[25] See *e.g.* Elegido, *supra* note 15 for the discussion of the nature of social control in pre-colonial Nigerian societies.

[26] See Larissa Behrendt, "Cultural Conflict in Colonial Legal Systems: An Australian Perspective" in Catherine Bell & David Kahane, ed., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 116 where it is stated that mediation can be described as an extension of adversarial system rather than an "alternative" to it.

The court-annexed mediation program of Lagos State is not only the first court-annexed mediation in Nigeria, but also the first major step to encourage the use of western-style mediation in the resolution of disputes in the Nigerian legal system. It is hinged on the misconception that the legal assumptions that influenced the development of mediation in the United States, Canada and other advanced common law jurisdictions are applicable without modification to Nigeria because of its common law background.[27] This belief neglects the fact that similarities in legal systems do not translate to similarities in cultures and that it is common for dominant groups to conceive their own method as "one-cap fits all" design thereby ignoring other perspectives.[28] For example, the imposition of the common law in Nigeria meant that the customary laws indigenous peoples of Nigeria were denied the same recognition which other sources of law enjoy. To qualify as law in any superior court in Nigeria, custom must be strictly proved as a matter of fact.[29]

---

[27] See Oke, *supra* note 18 at 8 where she argues that mediation is ideal for Nigeria because ADR is acceptable to parties and their counsel in the United States and Europe, despite the existence of case management tools and advanced facilities for recording court proceedings in those countries.

[28] David Kahane, "What is Culture? Generalizing about Aboriginal and Newcomer Perspectives" in Catherine Bell & David Kahane eds., Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver, UBC Press, 2004) 28 at 46 argues that the less powerful cultural group is always as guilty as the dominant group by viewing others through its own cultural lens. However, the acculturation or assimilation that usually occurs by reason of the domination by the more powerful group makes it possible for the members of the less powerful culture to understand the perspective of the more powerful more adequately than the more powerful understands that of the less powerful.

[29] *Evidence Act*, Cap. E14 L. F. N, 2004, s.14 (3). In contrast, all statutes and any subsidiary legislation made under them, which have the force of law in any part of Nigeria as well as rules and principles which have been held to have the force of law in any superior court in England or Nigeria do not need proof of any kind: ss.72 & 73.

Issues relating to language, differences in cultural traits and symbols, mediator's lack of skills and strategies are problems that may likely affect mediation of disputes between parties of different cultural backgrounds. However, the much bigger problem arises when the mediator is either ignorant of the different cultural nuances between the parties or the mediation process itself is both alien and insensitive to the cultural backgrounds of the parties. The position of the mediator in the traditional Nigerian set-up differs significantly from that of the western style mediation. He is usually well known to the parties and is in fact almost always selected on the basis of his or her familiarity with both the parties and the facts of the disputes. In complex cases, co-mediation is often adopted and the co-mediators are also people that are known to the parties and aware of the facts of the case. In disputes relating to land, the co-mediators are not only known to the disputants but are usually elders chosen on the basis of their proven honesty, wisdom, and experience.

The features evident in mediation as practised in communities across Nigeria are not in any way reflected in the court-annexed mediation program of Lagos State. Under the Lagos program, the mediator is usually appointed on the basis of his or her training and ability to maintain the required neutrality in the course of mediation. It is immaterial whether or not he or she is an elder or a contemporary of the disputants, since it is assumed that he or she will earn the respect of the disputants if he or she has the necessary skills to facilitate discussions between the disputants. Just like adversarial adjudication did in Nigeria, western style mediation may alienate people because, despite its proven advantages, it does not reflect the culture of all of the people which it is meant to serve. It is beyond the scope of this thesis to explore more culturally appropriate mechanisms to resolve disputes and whether it is possible for them to be successfully adopted alongside or within existing Nigerian legal process. It is raised here to make the point that comparing Nigeria to other jurisdictions for the purpose of identifying problems and raising issues of reform is only one part of a larger challenge if dispute resolution processes are to move beyond settlement to satisfaction.

### C. Comparison between the Lagos Program and Programs across Canada

The court-annexed mediation program of Lagos State is not a novel project. It is a case of transplantation of an already designed and existing model used in other jurisdictions. As shown in the preceding chapters of this thesis, court-annexed mediation had been established in different provinces across Canada many years before the establishment of the Lagos project. Expectedly therefore, there are areas of similarities as well as differences between the Lagos program and those found in most Canadian provinces. Some of these are raise here.

The first point of comparison between the court-annexed mediation program of Lagos State and those across Canada is the rationale for incorporating mediation into their respective court systems. As discussed, the establishment of the court-annexed mediation program of Lagos State was also necessitated by the need to reduce the volume and disposition time of cases that are pending in courts, and also provide a much cheaper alternative for litigants.[30] Lagos judiciary has an average of about three hundred cases pending before each of its judges whose courts are usually run under very harsh conditions.[31] Extremely high volume of cases brings about delay that most disputes experience before getting to trial. The problem of delay is often compounded by the fact the likely duration of a case is usually factored into the fees that clients are charged. This makes litigation very expensive in Lagos State. The delay and high costs of litigation result in frustration on the part of lawyers and litigants as well as general distrust for the legal system. Businesses and other activities are always crippled whenever parties try to exploit the loopholes in the judicial process. For example, in trademark cases, it is possible for a company whose goods are seized in execution of an Anton Pillar order to be out of business for up to six months.[32] The cost of litigation becomes outrageous for companies because of factors like the overhead costs which continue to accumulate when the business is paralysed and frustration for the company's costumers who may run out of supplies during the time the injunction is in force.

---

[30] *Supra* note 3.

[31] Oke *supra* note 18 at 2.The judges work without stenographers and proceedings are recorded in long hand in courtrooms that lack air-conditioning facilities. The epileptic nature of power supply and the congestion of the courtrooms on a daily basis make it very difficult for the judges to function optimally.

[32] Anton Pillar injunctions are usually granted *ex parte* on the application of any party that can reasonably prove to the court that its trademark or other proprietary rights have been infringed upon. The applicant is usually asked to provide security before the order is executed and parties are usually required to return within a very short time for the hearing of the motion on notice. As a result of the circumstances under which Nigerian courts operate, it is

Another point of comparison between the Lagos program and those across Canada is the different attitudes of the law towards mediation in general and court-annexed mediation in particular. Influenced by the success of private mediation in the settlement of disputes between parties, lawmakers started legitimizing mediation by incorporating it into some of their legislation.[33] Family law, for example, is an area where the law has been hugely influenced by mediation. Issues like divorce, sharing of family assets, access and custody of children are usually mediated and only proceed to adjudication where parties are not able to reach settlement.[34] In a similar manner, court-annexed mediation programs were established in the provinces by incorporating mediation into the rules of courts. However, the situation is different in Lagos

---

possible that the court might hear the parties on the return date or at any other time within six months or more.

[33] See e.g. *The Agricultural Operations Act*, S.S. 1995, c. A-12, s.16 (1) &(7) which provides that for the purposes of this Act, the board may appoint a person as mediation officer to assist the parties to resolve a dispute and that evidence arising from anything said, evidence of anything said, or evidence of an admission or communication made in the course of mediation is not admissible in any case or matter or proceeding before a court, except with the written consent of mediator and all parties to the cause or matter in which the mediator acted.

[34] See *e.g. Divorce Act*, R.S.C.1985, c.3, s.9 (2) which imposes a duty on every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters. See also *The Children's Law Act*, S.S. 1990 -91, c.C-8.1.

State. As earlier stated, mediation as practised in Canada was largely unknown among Nigerians before the establishment of the court-annexed mediation program in Lagos. Except for the practice direction which guides its operation in Lagos, the program has not been legitimized by law, since it exists without the requisite legal foundation and awareness. It is a mere imposition by the Chief Judge of Lagos which has not altered the court rules in any way. The courts can still order parties to make use of mediation facilities at the LMDC so long as the authority has not been challenged by any of the parties. But it is doubtful if such order can stand if it is appealed against on the basis of the denial of the disputant's right to fair hearing.

The scope of the application of the Lagos program is however similar to those in Canadian provinces. In Canada, court-annexed mediation is applicable to family disputes and to all kinds of civil actions. In Saskatchewan, for example, while the Mediation Services Branch of the Department of Justice provides mediation in family disputes, the court-annexed mediation also applies to all non-family civil actions.[35] The experience in private mediation showed that mediation is best suited for cases in which the disputants are still likely to continue with their relationship after the resolution of their dispute. These types of relationships are usually found between business people, family members or ex-spouses. However, the success achieved in those areas probably influenced the expansion of the dragnet in court-annexed mediation programs across Canada, to include all kinds of civil disputes. In this regard, the Lagos program is very much similar to those in Canada.

---

[35] *The Queen's Bench Regulations*, R.R.S. 1999 c. 1-1.01, O.C 433/99, s.5 (2). See also Alberta, *Court of Queen's Bench Practice Note 11*, r.1 which provides that mediation should apply to all non-family civil litigation under the pilot program established in the judicial districts of Edmonton and Lethbridge/Macleod.

Despite the apparent lack of experience in mediation, the Lagos program does not restrict mediation to those kinds of cases where it has proven to be suitable in other jurisdictions. The courts have the discretion to refer any kind of civil case to mediation, notwithstanding whether or not the dispute in question is suitable for mediation. The Lagos program is, however, designed to encourage the use of mediation in cases where it is considered suitable. For example, after completing the necessary forms and exchanging information about the case, the disputants may be invited for an intake screening to determine the suitability or otherwise of mediation to their case. Cases that are suitable for mediation are usually taken into the center while parties are advised to make use of other suitable processes in cases where mediation is considered unsuitable for their disputes. As sound as this strategy is, it is not likely to be used in cases where parties have been ordered or referred to have their case mediated at the LMDC by a judge.

It is unrealistic to think that mediation is a panacea for all kinds of disputes. As discussed in Chapter Two, separating spouses who had children together while in marriage are definitely going to relate with each other after the dissolution of the marriage. Therefore it is understandable if issues relating to division of family assets, custody and access to children are mediated to avoid the destruction of any good faith that might still exist between the parties after their dispute. Similarly, common concerns regarding confidentiality, maintenance of existing business relationships and avoidance of delay makes mediation suitable for commercial disputes. That is why private mediation became very successful in these areas. Mediation is not ideal for cases where either the rights of individuals are in question or there is need for a precedent to be set by the court. As pointed out by Farrow, the decisions made in private and confidential set-ups like mediation are not known to the public and when they are known "there is no record or guarantee of fairness of the procedural or substantive legal regimes that were employed to reach a given result."[36] This fact is glossed over by courts when they become more concerned with tackling the problems of inefficiency and excessive workload than judicial law making and justice administration. In the face of the intimidating problems confronting the court system in Lagos State, it is very hard to believe that the judges might be able to resist the temptation of diverting as many cases as possible to mediation regardless of the nature of such cases.

A fourth point of comparison between the two jurisdictions is the degree of the impact of court-annexed mediation in the respective legal systems. It has been stated in Chapter Three of this thesis that making mediation available within the court systems in Canada broadens the options available to litigants; led to quicker and cheaper resolution of disputes in certain situations; demystified the law by providing opportunities to members of the public to understand and follow the direction of their cases; and created greater awareness about mediation among members of the legal community and thereby helped in changing the attitude and practice of many lawyers. The programs across Canada have been able to impact on litigation and legal practice, because they have existed for some time. For example, the mandatory mediation program in Ontario dates back to the mid-1990s when the first pilot projects were established in Toronto and Ottawa while the Notice to Mediate program of British Columbia commenced in 1998.[37]

---

[36] Trevor C. Farrow, "Privatizing Our Public Justice System" (2006) 9 C. J. F.C.: News & Views on Civil Justice Reform 16.

The court-annexed mediation program of Lagos State, is yet to impact significantly on the legal system and legal education. It is relatively new. Many members of the bar and bench, as well the general public, are still unaware of its processes and potential.[38] However, it has shown great promise in terms of timely disposition of disputes and reduction of costs in situations where it has been used. For example, the first matter that came for mediation at the centre was an action filed by disengaged staff of a bank against their former employer.[39] The matter had been awaiting trial for about three years before the judge ordered the parties to try mediation at the Lagos Multi-door Courthouse. The dispute was settled after three hours of discussions between the parties and caucusing by the mediator and the settlement agreement was filed in court as consent judgment. If, as is the case of Canadian programs, settlement is the primary goal, the Lagos Multi-door Courthouse is not only equally likely to adapt classic mediation in manners similar to Canada, but also likely to generate similar problems and outcomes.

---

[37] *Mandatory Mediation, Ontario* online: <http://www.mediate.ca/ontariommp.htm>; Dispute Resolution Office "Information Bulletin: Notice to Mediate (General) Regulation" (June, 2002) online: Dispute Resolution Office Bulletin<http//www.ag.gov.bc.ca>

[38] The first workshop for judges on the workings of the Lagos Multi-door Courthouse was held on March 7, 2002.Court referrals commenced after the workshop on an average of five cases per week.

Experience with the Canadian jurisdictions has shown that classic mediation is usually adapted to suit the purpose for which it is annexed into the judicial process. In Ontario, for example mandatory mediation was adopted as a part of the case management system designed to tackle the problem of delay in the civil justice system. Mediation in that circumstance runs the risk of losing some of its essential elements such as empowerment of parties and generating creative options for settling disputes. Those kinds of mediation are also usually dominated by lawyers since they are concerned primarily with settlements which are often expressed in monetary terms rather than the satisfaction of the parties. Apart from the fact that mediation is not mandatory under the Lagos program, there is nothing to suggest that it will not follow the trend observed in other court-annexed mediation programs where classic mediation is usually adapted to fit into the settlement paradigm. The Lagos judiciary probably bought the idea of court-annexed mediation because they thought it could be used to clear the backlog of cases and reduce the pressure on the courts' time. It may take a little while before the adaptations observed in the Canadian jurisdictions become noticeable in Nigeria.

---

[39] Aina, *supra* note 1 at 9.

The Lagos program also differs from the programs in Canadian jurisdictions in terms of the flexibility given to disputants and their lawyers regarding when to use mediation for their disputes. Except parties are referred to mediation by the court, the choice of whether to use mediation for their case and when to use it is theirs. The effect of this is that unlike in Canadian provinces where disputants are pressured into mediation very early in litigation, parties under the Lagos program are more likely to negotiate more honestly since they are under any kind of obligation to mediate their dispute.

Developments in Canadian jurisdictions have shown that court-annexed mediation can worsen the problem of high cost of litigation. Court-annexed mediation is characterised by the use of pressure to bring parties to mediation and apparent lack of choice by the litigants. The implication is that many cases go through mediation and still come out unsettled because the parties either lack belief in the process or will want to have their dispute adjudicated. The cost of litigation therefore increases for such parties when the cost of mediation is added to the legal fees that parties pay. Mediation, in those circumstances, also increases the disposition time for cases. Just like the programs across Canada, the Lagos program is designed to thrive on coercion. The possibility of having all manner of cases diverted to mediation might bring about greater financial burden on litigants who fail to settle their disputes through mediation.

## D. Lessons for Nigeria

Despite the arguments of critics, mediation has come to stay as a dispute resolution method in the Canadian legal system, and can indeed be a viable alternative to adversarial adjudication.[40] The emergence and development of mediation in Canada provides many lessons for Nigeria as a developing common law system. Problems encountered in Canada are likely to arise in Nigeria given the common rationale for annexing mediation and similarities in the process. I conclude this thesis with a summary of some of the more general lessons to be learned.

First, the developments in Canada have proved that mediation can be a relatively cheap, speedy, flexible and fair method of resolving disputes. However, to deliver the goods, parties should be allowed to enter into it voluntarily and the essential elements such as the neutrality of the mediator, party control of the process and creativity in settlement options should neither be distorted nor completely extinguished to ensure satisfactory and enduring agreements. Analysis of the court-annexed mediation programs across Canada showed that court-annexed mediation creates problem for the legal system because mediation is adapted for the purpose of decongesting the courts and not to empower disputing parties. The effect of this is the destruction of the potentials which mediation had as a dispute resolution method. There is nothing to suggest that the court-annexed program of Lagos State is going to be different from those in Canada. Coercion can make parties mediate their dispute. However, such mediation does not necessarily encourage good-faith discussions and therefore do not always result in enduring settlements.

---

[40] Critics usually warn that despite the freedom and empowerment that comes with the alternative dispute resolution methods which include mediation, their use amount to privatization of civil justice administration. Rights of individuals are potentially undermined and other democratic values might also be disregarded because of lack of procedural safeguard in such processes: See *e.g.* Farrow, *supra* note 35 at 17.

Voluntary mediation whether private or court-annexed, can only thrive when the public and members of the legal community are adequately informed about mediation and the potential benefits of using it in resolving disputes. For example, despite the support given to mediation in its early days by the American Bar Association, many lawyers in the United States were not enthusiastic about using it for solving their client's problems.[41] That was probably because many of the practising lawyers at the time had little or no understanding of the field. However, knowledge about mediation has been enhanced in the United States and Canada by the inclusion of alternative dispute resolution into the curricula of many law schools. This is a very important step since lawyers are the most important source of legal information and advice in society. The Nigerian Bar Association should take a cue from the attitude of their counterparts in Canada in evaluating the problems confronting the Nigerian legal system and making recommendations on how to make it function more effectively. As in Canada, the Nigerian Bar Association should liaise with the Universities in developing more comprehensive curricular for the training of law students. In order to get the best out of the students, ADR ought to be made one of the core courses to be offered by students at the Nigerian Law School before such students are admitted to the Nigerian Bar. Making ADR compulsory at the law school will help to plug the loophole observed in the Canadian jurisdictions where ADR is often made an elective course which is non-graded in some universities. This reduces the impact it is supposed to have on students' academic standing. For this reason, many law students do not take ADR seriously.

---

[41] Peter Lovenheim, *Mediate, Don't Litigate* (New York: McGraw-Hill Publishing, 1989) 17.

Despite its problems, mediation has been very helpful in the resolution of cases where the law has always failed to provide adequate remedy, for example, family and commercial disputes. This is a point that should be of interest to Nigeria. Mediation can be used in the resolution of most land and tenancy disputes that stay in the cause lists of rent tribunals across Nigeria for years without being tried. Most tenancy and land matters in Nigeria are suitable for mediation because the parties in most cases do not want to terminate the relationship but would rather want to solve their problem. It is believed that when Nigerians become enlightened about mediation and are ready to try it in tenancy matters before filing actions at the Rent Tribunal, the number of cases awaiting trial at the rent tribunals is likely to drop significantly. This will help in decongesting the courts thereby making more spaces available for other matters.

A project like that of Lagos court-annexed mediation needs a solid foundation in order to achieve the desired goal. Copying what has been established elsewhere without creating the right environment for it might create a bubble but not deliver the desired results. Mediation, whether private or court-annexed, needs statutory and ethical guidelines to function effectively. In the United States, for example, the Congress responded to the successful experiments in Los Angeles, New York and Atlanta by enacting legislation to enable more communities  establish mediation centres similar to the specimen centres in the three cities.[42] The states across the US and provinces in Canada eventually followed by enacting laws regarding mediation and establishing codes of conduct for people that are going into the new field. Apart from conferring legitimacy on the process of mediation, statute also helps in educating the members of the legal community about the desirability of mediation in the legal system.

Western style mediation was virtually unknown to Nigerians before the commencement of the Lagos Project. It would have made more sense if attempts were made to experiment the possibility of using mediation to settle minor disputes privately and creating the awareness about the process before incorporating it into the judicial process.[43] It is therefore recommended that other states in Nigeria learn from the provinces across Canada by enacting legislation that will guide the establishment and use of mediation in their respective jurisdictions. As argued in Chapter Three, new regulations to address issues as possible coercion and manipulation in reaching settlement are also desirable.

---

[42] See *Dispute Resolution Act of 1980,* 28 U.S.C § 94.17.

Another important lesson for Nigeria from the Canadian experiences is that a concept like mediation which is expected to be flexible should reflect the cultural traits and experiences of the people it is meant to serve. In Canada, the emergence and annexation of mediation into the judicial process has not changed the way minority members of the society perceive the legal system because mediation is still entirely a western-style method of resolving disputes. However, just as mediation has been adapted to fit into the judicial process, it should also be adapted to suit the Nigerian cultural context. Concepts such as co-mediation and the use of elders knowledgeable in the customs of the people should be encouraged since that is usually what obtains in mediation within the traditional setting. Again, mediators should be trained in the cultural traits and habits of Nigerians and not only on the skills necessary to facilitate communication between disputing parties.

---

[43] Lack of awareness explains why it took the Lagos Multi-door Courthouse some months to have the first case referred it from the court after its establishment.

## E. Conclusion

The analyses made in this thesis have shown that mediation has come to stay in common law jurisdictions. Its wide acceptance by the society and growing influence on the members of the legal community is a reflection of the philosophy of co-operative problem solving which is gradually replacing the adversarial mind-set in deserving cases. While this has potential benefits for the legal system, courts should be cautious in annexing mediation to the judicial processes. Annexation should be made not only to have cases settled promptly but also with the objective of increasing the satisfaction derived by the disputants from the judicial process. The Toronto experience has shown that pressuring parties into mediation might not help after all in decongesting the courts since parties may not engage in frank discussions with each other and are therefore likely to come back to litigation.

Volition is essential in any mediation program designed to help achieve settlement and increase satisfaction of disputants with the court system. However, parties can only participate in mediation if they are aware of its process and potential. That is why it is very important that lawyers, judges and other members of the legal community be properly informed about mediation to enable them educate the public accordingly. The need for education is even greater in jurisdictions such as Nigeria where the literacy rate is not so high and lawyers are the only reliable source of legal information for their illiterate clients. Having highlighted some of the general problems confronting the court-annexed processes in Canada and that Lagos program, it is believed that other jurisdictions in Nigeria shall learn from the recommendations made above in designing their own programs.

# BIBLIOGRAPHY

## LEGISLATION

*Administration of Justice Act – Ontario Regulation 43/05*

*Administration of Justice Act – Ontario Regulation 451/98*

Alberta, *Court of Queen's Bench Practice Note 11.*

Alberta, *Mediation Rules of the Provincial Court – Civil Action.*

Alberta, *Provincial Court Mediation Rules.*

Alberta, *Rules of Court.*

British Columbia, *Small Claims Rules.*

*Canadian Environmental Assessment Act*, S. C. 1992, c. 37.

*Child and Family Services Act*, R.S. O. 1990, c. C-11.

*Children's Law Act*, S.S. 1990, c. C- 8.1.

*Children's Law Reform* Act, R.S.O 1990, c. C12.

*Constitution of the Federal Republic of Nigeria*, 1999.

*Court Rules Act – Small Claims Regulation 251/2005.*

*Court Rules Act – Small Claims Regulation 250/2005.*

*Dispute Resolution Act of 1980*, 28 U.S.C § 94.17.

*Divorce Act*, R.S.C.1985 (2nd Supp), c. 3.

*Education Mediation Regulation* (B. C. Reg. 250/2000).

*Evidence Act (Nigeria)*, Cap. E.14 L.F.N., 2004.

*Family Act*, R.S.O 1990, c. F.3.

*Family Maintenance Act* S.S. 1990, c. F-6.1.

*Family Maintenance Act*, S.S 1997, c.F-6.2.

*Federal Rules of Evidence,* C.F.R. § 408 (2004).

*Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241.

*Matrimonial Property Act,* R.S.A. 2000, c. M-8.

*Minnesota Civil Mediation Act*, 2005 Minn. Stats. 572.31 at 572.35 (1988).

Nigeria, *The Lagos Multi-door Courthouse Practice Direction.*

*Notice to Mediate (General) Regulation, B. C. Regulation* 4/2001.

*Notice to Mediate (Residential Construction) B. C Regulation 152/99.*

Ontario, *Civil Procedure Rules.*

Ontario, *Family Court Rules.*

Ontario, *Rules of Civil Procedure* (Court and Superior Court of Justice).

Ontario, *Rules of Civil Procedure.*

*The Agricultural Operations Act*, S.S. 1995, c. A-12.

*The Child, Family and Community Service Act,* R. S.B.C. 1996, c. 46.

*The Children's Law Act*, S.S 1997, c. C-8.2.

*The Children's Law Act*, S.S. 1990 -91, c. C-8.1.

*The Queen's Bench Regulation, R.R.S* 1999 c.1-1.01.

*The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1.

## JURISPRUDENCE

*Baker v. Campbell* (1983) 49 A.L.R 385 (S.C.A).

*Bates v. Bates* (1992) O.J No 6869 Ont. Ct 9 (Gen. Div.).

*Demarco v. Ungaro* (1979) 95 D.L.R. (3d) 385. (Ont. H.C).

*Donaher v. Porcaro* (1999) 715 N.E. 2d. 464.

*Elohor v. Osayande* [1992] 3 N.W.L.R. 524 at 541-542 (S.C).

*Lange v. Marshall* (1981) 7 Fam. L.Rptr. 2583 (Mo. Ct App.).

*McDonald v. McDonald* (1987) 6 R.F.L (3d) 17 (B.C.S.C.)

*Porter v. Porter* (1983) 40 O.R. (2d) 417 (Q.B).

*R v. Gruenke* [1991] 3 S.C.R. 263.

*Rabin v. Mendoza* [1954] 1 W.L.R. 271 (C.A).

*Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151 (K.B).

*Seager v. Copydex Ltd.* [1967] 2 All E. R. 415 (C.A).

*Slavutych v. Baker* [1976)] 1 S.C.R. 254.

## SECONDARY MATERIALS: BOOKS

Adams, George W. *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian, 2003).

Alfini, James J. & Eric R. Galton, eds., *ADR Personalities and Practice Tips.* (Washington: American Bar Association Section of Dispute Resolution, 1998)

Asein, John O. *Introduction to Nigerian Legal System* (Lagos, Ababa Press, 2005).

Astor, Hilary & Chinkin, Christine. *Dispute Resolution in Australia*, 2nd ed. (Sydney: Butterworths, 2002)

Auerbach, Jerold S. *Justice Without Law?* (Oxford: Oxford University Press, 1983).

Beck Connie J.A. & Bruce D. Sales. *Family Mediation: Facts, Myths and Future Prospects* (Washington, DC: American Psychological Association, 2002).

Boulding, Kenneth. *Three Faces of Power* (Newbury Park, CA: Sage Publications, 1989).

Boulle, L. & K. J. Kelly. *Mediation, Principles, Process and Practice* (Toronto: Butterworths, 1998).

Boulle, Laurence. *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996)

Brown, Henry J. & Marriot, Arthur L. *ADR Principle and Practice* (London: Sweet & Maxwell, 1993).

Burton, John, *Conflict: Human Needs Theory* (New York: St. Martin's Press, 1990).

Bush, Robert A. Baruch & Joseph P. Folger. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers, 1994)

___________*Designing Mediation: Approaches to Training and Practice within a Transformative Framework* (New York : The Institute for the Study of Conflict Transformation, 2001).

Carbonneau, Thomas E. *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds* (Urbana: University of Illinois Press, 1989).

Charlton, Ruth & Dewdney, Micheline. *The Mediator's Handbook: Skills and Strategies for Practitioners* (Sydney: Law Book Company, 1995)

Chornenki, Genevieve, & Christine Hart. *Bypass Court*, 2nd ed. (Toronto: Butterworths, 2001).

Cloke, Kenneth. *Mediating Dangerously: The Frontiers of Conflict Resolution*. (San Francisco: Jossey-Bass, 2001.

Cook, R. F., J.A. Roehl & D. Sheppard. *Neighbourhood Justice Centers Field Test: Final Evaluation Report, Executive Summary* (Washington, D.C: Government Printing Office, 1980).

DeCoste, Fredrick C. *On coming To Law: An Introduction to Law in Liberal Societies* (Toronto: Butterworths, 2001).

Deutsch, Morton & Coleman, Peter T. eds. *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco: Jossey-Bass, 2000).

Elegido, Juan M. *Jurisprudence* (Ibadan, Spectrum Law Publishing, 1994).

Ellis, Desmond & Anderson, Dawn. *Conflict Resolution:: An Introductory Text* (Toronto: Emond Montgomery Publications, 2005).

Emond, Paul D., ed. *Commercial Dispute Resolution: Alternatives to Litigation*. (Aurora, ON: Canada Law Book, Inc., 1989).

Erickson, Stephen K. & McKnight Marilyn S.. *The Practitioner's Guide to Mediation: A Client Centered Approach* (San Francisco: Jossey-Bass, 2000).

Fisher, Roger, William Ury & Bruce Patton. *Getting to Say Yes: Negotiating Agreement Without Giving In*, 2nd ed. (New York: Penguin Books, 1991).

Fisher, Roger, Elizabeth Kopelman, & Andrea Kupfer Schneider. *Beyond Machiavelli: Tools for Coping with Conflict*. (Cambridge, MA: Harvard University Press, 1994).

Folberg, Jay & Alison Taylor. *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey- Bass, 1984).

Hall, Lavinia, ed. *Negotiation: Strategies for Mutual Gain*. Newbury Park, CA: Sage Publications, 1993.

Kakalik, James S. et al. *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Santa Monica, C.A: Rand, 1996).

Landau, Barbara et al., *Family Mediation Handbook*, 3rd ed. (Toronto: Butterworths, 2000).

Landsman, Stephen. *Readings on Adversarial Justice: The American Approach to Adjudication* (Washington D.C: West Publishing, 1988).

Lax, D.A., and J.K. Sebenius. *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: Free Press, 1986.

Lewicki, Roy J., David M. Saunders, and John W. Minton. *Negotiation: Readings, Exercises, and Cases*, 3d ed. (Columbus, OH: Richard D. Irwin and McGraw Hill, 1999).

Lovenheim, Peter. *Mediate, Don't Litigate* (New York: McGraw-Hill Publishing, 1989).

Macfarlane, Julie. *Dispute Resolution Readings and Case Studies*. (Toronto: Emond Montgomery Publications, 1999).

Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. (Cambridge, MA: Belknap Press, 2000).

Moore, C.W. *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed. (San Francisco: Jossey-Bass, 1996).

Noble, Cinnie, L. Leslie Dizgun & Paul D. Emond. *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998).

Pearce, W. Barnett, and Stephen W. Littlejohn. *Moral Conflict: When Social Worlds Collide*. Newbury Park, CA: Sage Publications, 1997.

Pirie, Andrew J. *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000).

Platto, Charles. *Economic Consequences of Litigation Worldwide* (The Hague: Kluwer Law International, 1999).

Plucknett, Theodore F.T. *A Concise History of the Common Law*, 5th ed.(London: Butterworths,1956).

Pollock, Frederick & Frederick William Maitland. *The History of English Law*, 2nd ed., vol.2 (Cambridge: University Press, 1911).

Pound, Roscoe. *Interpretation of Legal History* (Cambridge: University Press, 1923).

Nance, Dale A. *Law and Justice: Cases and Readings on the American Legal System* (Durham: Carolina Academic Press, 1999).

Rogers, Nancy & Craig McEwen. Mediation*: Law, Policy and Practice* (New York: West Publishing, 1997).

Sander, Frank E. *Varieties of Dispute Processing* (St. Paul, MN: West Publishing Co, 1976).

Schrock-Shenk, Carolyn, ed. *Mediation and Facilitation Training Manual: Foundations and Skills for Constructive Conflict Transformation*, 4th ed. (Akron, PA: Mennonite Conciliation Service, 2000).

Shields, Richard W., Judith P. Ryan &, Victoria L. Smith. *Collaborative Family Law: Another Way to Resolve Family Disputes* (Scarborough, Ontario: Thomson Carswell, 2003).

Silver, Michael P. *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths, 2001).

Stitt, Allan J. *Mediating Commercial Disputes* (Aurora, ON: Canada Law Book Inc., 2003).

Stone, Katherine V.W. *Private Justice: The Law of Alternative Dispute Resolution* (New York: Foundation Press, 2000).

Susskind, Lawrence E., S. McKearnan, and J. Thomas-Larmer, J., eds. *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement.* (Thousand Oaks, CA: Sage, 1999).

Wigmore, J.H. *Evidence in Trials at Common Law*, rev. by J.T McNaughton (Boston: Little Brown, 1961).

Winslade, John, and Gerald Monk. *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2000).

## SECONDARY MATERIALS: ARTICLES

Aina, Kehinde. "The Lagos Multi-door Courthouse – One Year After" Paper presented at the workshop on "The Lagos Multi-door Courthouse: The Procedure and Promise' held at the foyer of Lagos High Court, September 30, 2003 [unpublished] 1.

Alfini, James J. "Trashing, Bashing and Hashing It Out: Is this the End of "Good Mediation"?" (1991) 19 Fla. St. U.L. Rev 47.

Astor Hilary. "Domestic Violence and Mediation." (1990) 1Aus. Disp. Res. J. 143.

Behrendt, Larissa. "Cultural Conflict in Colonial Legal Systems: An Australian Perspective" in Catherine Bell & David Kahane, ed., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver, UBC Press, 2004) 116.

Bell, George M. "Admissions Arising out of Compromise - Are They Irrelevant?" (1953) 31 Tex L. Rev. 239.

Bickerman, John. "Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR" (1999) Disp Res. Mag. 3.

Brands, Bethany Verhoef, *et al.* "The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views on Mandatory Farm Mediation." (1994) 79 Iowa L.Rev. 653.

Burger Warren. "Isn't There a Better Way?" (1982) 68 A.B.A J 274.

_________ "Our Vicious Legal Spiral" (1977) 4 Judges' J. 22.

_________"Agenda for 2000 A.D - A Need for Systemic Anticipation" *Proceedings of Pound Conference held in 1976*, 70 F.R.D 83.

Byrne, Edward. " The Adversary System: Who Needs it?" [1982] 6 ALSA Forum 1.

Cohen, Lester. "Mandatory Mediation: A Rose by Any Other Name." (1991) 9 Med. Quarterly 33.

Eaton, Sarah. "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes." (1990) 103 Harv. L. Rev.

Ethridge, Jack." Mending Fences: Mediation in the Community" in Levin, et al., *Dispute Resolution Devices in a Democratic Society* (Washington D.C: Pound-American Trial Lawyers Foundation, 1985).

Farrow Trevor C. "Privatizing Our Public Justice System" (2006) 9 C. J. F.C.: News & Views on Civil Justice Reform 16.

Folberg, Jay. "A Mediation Overview: History and Dimensions" (1983) 1 Med. Quart. 3.

Freedman Lawrence R. & Michael L. Prigoff. "Confidentiality in Mediation: The Need for Protection" (1986) 2 Ohio St .J. Disp. Resol. 37.

Freedman, Lawrence. "Confidentiality: A Closer Look" in Larry Ray, ed., *Mediation and the Law: Will Reason Prevail?* (Washington, DC: American Bar Association, 1983) 68.

Fuller, Lon L. " Mediation – Its Forms and Functions" (1971) 44 Cal. L. Rev. 305.

Gagnon, Andree G. "Ending Mandatory Divorce Mediation for Battered Women." (1992) 15 Harv. Wom. L. J. 272.

Gary, Smith. "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not." (1998) 36 Osg. Hall L. J. 847.

Golann, Dwight. "Making ADR Mandatory: The Constitutional Issues." (1989) 68 Oreg. L. Rev. 487.

Gordon, Elizabeth Ellen. "Attorneys' Negotiation Strategies in Mediation: Business as Usual ?" (2000) 2 Med. Quart. 371.

Gray, Owen V."Confidentiality in Mediation" (1998) 36 Osg. Hall L. J. 667.

Grillo, Trina. "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L. J. 1545.

Hensler, Deborah R. "A Research Agenda: What We Need to Know About Court-Connected ADR" (1999) Disp Resol. Mag. 15.

__________________ "The Real World of Tort Litigation" in Austin Sarat et al., eds., Everyday Practices and Trouble Cases (Evanston, Ill: Northwestern University Press, 1998) 155.

Hilton, Zoe. "Mediating Wife Assault: Battered Women and the 'New Family'" (1991) 9 C.J.F.L 29.

Ingleby, R. "Court Sponsored Mediation: The Case against Mandatory Participation." (1993) 56 Mod. L. Rev. 441.

Kahane, David. "What is Culture? Generalizing about Aboriginal and Newcomer Perspectives" in Catherine Bell & David Kahane eds., Intercultural Dispute Resolution in Aboriginal Contexts (Vancouver, UBC Press, 2004) 28.

Keet, Michaela & Teresa B. Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64 Sask. L. Rev. 57.

Kelly Joan B. & Lynn Gigy. "Divorce Mediation: Characteristics of Clients and Outcomes," in K. Kressel and D.Prutt, eds., *Mediation Research: The Process and Effectiveness of Third -Party Intervention* (San Francisco: Jossey-Bass, 1989) 1.

Korobkin, Russell & Chris Guthrie. "Psychology, Economics and Settlement: A New Look at the Role of the Lawyer (1997) 76 Tex. L. Rev. 95.

Kovach, Kimberley K. & Lela P Love, "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 Harv. Negot. L. Rev. 71.

Kuester, Erin L. "Confidentiality in Mediation: A Trail of Broken Promises" (1994-1995) 16 Hamline J. Pub. L. & Pol'y 573.

Kutak, Robert J. "The Adversary System and the Practice of Law"in David Luban,ed., *The Good Lawyer: Lawyers' Roles and Lawyers Ethics* (Totowa,NJ.: Rowman and Allanheld, 1983) 174.

Lande, John. "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation" (2000) 5 Harv. Negot. L. Rev. 137.

Langbein, John. "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 832.

Libsky, David B. & Ronald L. Seeber. " In search of Control: The Corporate Embrace of ADR" (1998) 1 U.Pa.J. Lab & Emp't L. 93.

Lind *et al.*, "In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System" (1990) 24 Law & Society Rev. 953.

Macfarlane, Julie. "Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre" in Julie Macfarlane ed. Dispute Resolution: Readings and Case Studies (Toronto: Emond Montgomery, 1999) 681.

__________"Culture Change? Commercial Litigators and Ontario Mandatory mediation Program" online: Law Commission of Canada <http://www.lcc.gc.ca>.

Macfarlane, Julie." Why Do People Settle?" (2001) McGill L. J. 663.

McAdoo, Barbara. "The Minnesota ADR Experience: Exploration to Institutionalization" (1991) 12 Hamline J. Pub. L. & Pol'y 65.

______________"A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil litigation Practice in Minnesota." (2002) 25 Hamline L. Rev. 401.

McAdoo, Barbara & Nancy Welsh, "Does ADR Really Have a Place on the Lawyer's Philosophical Map" (1997) 18 Hamline J. Pub. L.& Pol'y 376.

McEwen, C. A., N. H. Rogers & R.J Maiman. "Bring in the Lawyers: Challenging the Dominant Approaches to ensuring Fairness in Divorce Mediation"(1995) 79 Minn. Law. Rev 1317.

McEwen, Craig A & Richard J. Maiman. "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 Maine L. Rev. 237.

Menkel-Meadow, Carrie. "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR" (1991) 19 Fla. St. U. L. Rev. 1.

_________________" The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" (1995) 11 Neg. J. 217.

Metzloff, Thomas B. *et al.* "Empirical Perspectives on Mediation and Malpractice" (1997) 60 Law & Contem. Probs. 107.

Nader, Laura." Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology,"(1993) 9 Ohio St. J. on Disp. Res. 1.

Oke, Opeyemi O. "Decongesting the Courts: The Place of Lagos Multi-door Courthouse" Paper presented at the Workshop on the Lagos Multi-door Courthouse: The Procedure and Promise, held at the Foyer, High Court of Lagos, September 30, 2003.[unpublished] 2.

Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buff. Law Rev. 443.

Perino, Michael A. "Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act" (1995-1996) 26 Seton Hall L. Rev. 1.

Pirie, Andrew J. "The Lawyer as a Third Party Neutral" in D. Paul Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ontario: Canada Law Books, 1989).

Pirie, Andrew J. "The Lawyer as Mediator: Professional Responsibility Problems or Profession Problems?" (1982) 63 Can. Bar Rev. 378.

Pound, Roscoe. The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 40 American L. Rev 279.

Primm, Edith B."Neighbourhood Justice Centre: A Brief 26 Year History," online: The Atlanta Bar <http://www.atlantabar.org/aba/adr >.

Rea Noel. "One Counsel's Experience with introducing Alternative Dispute Resolution (ADR) in a Corporate Setting" (2006) 9 C.F.C.J: News & Views on Civil Justice Reform.

Riskin, Leonard L. "Mediation and Lawyers" (1982) 43 Ohio St. L. J 29.

Rubin, Jeffrey. "Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations" (1980) 87 Psych. Bul. 379 at 382 - 383.

Sander, Frank E. et al. "Judicial Mis(use) of ADR?: A Debate" (1996) 27 U. Tol. L. Rev. 885.

Sochynsky, Yaroslav. "Mediation - A Guide for Practitioners" California ADR Practice Guide, Reprinted in Katherine V.W Stone, Private Justice: The Law of Alternative Dispute Resolution (New York: Foundation Press, 2000) 40.

Steinlight, Jean R. "Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-adversarial Setting" (1999) 14 Ohio. St. J. on Disp. Res. 269.

Tenerowicz, Matthew A. "Case Dismissed - or Is It? Sanctions for Failure to Participate in Court-mandated ADR" (1998) 13 Ohio St. J. Disp.Res. 975.

Thomas, Eisele, G. "The Case Against Mandatory Court Annexed ADR Programs." (1991) 75 Judicature 34.

Thomson, Bonita J. "Commercial Dispute Resolution: A Practical Overview" in D. Paul Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, Ontario: Canada Law Books, 1989) 89.

Vaver, David. "Without Prejudice" Communications - Their Admissibility and Effect" (1974) 9 U.B.C. L. Rev 85.

Watson, Hamilton Jonnette. "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan." (1999) 24 Queen's. L. J. 561.

Weiss, Steven. "ADR: A Litigator's Perspective: Viewing the Pluses and Minuses" Bus. Law Today (Mar./ April,1999).

Welsh, Nancy. "Making Deals in Court-Connected Mediation: What's Justice Got to do With It" (2001) 79 Wash. U. L. Q. 787.

Welsh, Nancy. "The Lawyers' Buffet: Options in Resolving Disputes" (1987) Bench & Bar of Minn. Nov. 17.

## OTHER MATERIALS

Alberta Justice, "Court Services," online:<http://www.albertacourts.ab.ca/court services/mediation>

Alberta Justice, *Annual Report 1995-1996* (Edmonton: Alberta Justice, 1996).

Alberta Justice, *Annual Report 2001-2002* (Edmonton: Alberta Justice, 2002).

Alberta Justice, *Report of the Working Committee on Court-annexed Mediation in Civil Matters* (Edmonton: Alberta Justice, 2002).

Alberta Law Reform Commission. *Dispute Resolution: A Directory of Methods, Projects and Resources*. Research Paper No. 19. Edmonton: Alberta Law Reform Institute, 1990.

Alberta Law Reform Institute, *Promoting Early Resolution of Disputes By Settlement* (Edmonton: Alberta Rules of Court Project, 2003).

Alberta Law Research Institute, *Court-connected Family Mediation Programs in Canada* (Research Paper No.20) (Edmonton: Alberta Law Reform Institute, 1994).

Australian Law Reform Commission. *ADR - Its Role in Federal Dispute Resolution.* Issues Paper 25. Canberra: ALRC, June 1998.

Australian Law Reform Commission. *Managing Justice: A Review of the Federal Civil Justice System.* Report 89. Canberra: Commonwealth of Australia, 2000.

Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (Ottawa: The Canadian Bar Association, 1996).

Canadian Bar Foundation. *Windsor-Essex Mediation Centre: History and Pilot Project Evaluation 1984* (Ottawa, Ontario: Canadian Bar Foundation, 1984).

Dispute Resolution Office, "Information Bulletin: Notice to Mediate (General) Regulation" (June, 2002) online: Dispute Resolution Office Bulletin <http://www.ag.gov.bc.ca>.

Institute for Civil Justice, *Annual Report of the Institute for Civil Justice, 1988-1989* (Santa Monica, Cal: The Rand, 1989).

Mandatory Mediation, Ontario, online: <http://w.w.w. Mediate. ca/ontariommp>.

Saskatchewan Civil Mediation Program, online: <http://w.w.w.sakjustice.gov.ca>.

Society of Professionals in Dispute Resolution (SPIDR), *Qualifying Neutrals: The Basic Principles: Report of the SPIDR Commission on Qualifications* (Washington, D.C: National Institute for Dispute Resolution, 1989).

The Neighbourhood Justice Centre of Atlanta, *Training Manual For Mediators* (Atlanta: Neighbourhood Justice Centre, 1987).